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January 6, 2004

RECEPTED

Email at: Pam.Bonrud@state.sd.us and HAND-DELIVERED

Pamela Bonrud Executive Director SD Public Utilities Commission 500 E Capitol Avenue Pierre SD 57501

JAN 06 2005

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

RE:

RCC Minnesota, Inc. and Wireless Alliance, L.L.C., d/b/a Unicel for Designation GPGN File No. 7401.040099 as an ETC - Docket TC 03-193

Dear Ms. Bonrud:

Enclosed please find Petitioners' Brief in the above-entitled matter. The hard copy and ten copies will be hand-delivered to you on Thursday. As agreed to by all parties, I will also enclose four courtesy copies of RCC's cited cases with the hand-delivered brief.

I have emailed the brief to all counsel and I will forward the hard copy of the brief and copy of the cases to all counsel by Next Day Delivery.

If you have any questions, please let me know.

Sincerely,

Talbot J. Wieczorek

TJW:klw Enclosures

c: Via Email and Next Day Delivery to:

Darla Pollman Rogers

Richard Coit

James Cremer

Meredith Moore

Clients

## 

## Before the South Dakota Public Utility Commission 500 East Capital Avenue Pierre, South Dakota 57501-5070

JAN		2005

SOUTH DAKOTA PLA UTILITIES COMMISSE

In the Matter of the Petition of	)	
RCC Minnesota, Inc. Wireless Alliance, LLC	)	Docket No. TC03-193
For Designation as an Eligible Telecommunication s Carrier Under 47 U.S.C. Section 214(e)(2)	)	

To: The Commission

## BRIEF OF RCC MINNESOTA, INC. AND WIRELESS ALLIANCE LLC

### I. INTRODUCTION

"As an overarching principle, it is the interests of the public – the consumers of telecommunications services – that must be considered. The interests of individual carriers, or categories of carriers, is a secondary consideration if it is to be considered at all." Thus Don Wood succinctly captured the touchstone for determining the public interest in this docket. By this measure, as well as others, a grant of the joint petition filed by RCC Minnesota, Inc. and Wireless Alliance LLC ("RCC"), is unquestionably in the public interest for South Dakota.

Unlike large national carriers, who mainly serve our nation's cities and highways, RCC is almost exclusively focused on America's rural areas. Virtually all of RCC's South Dakota's licensed service area is properly characterized as rural. RCC has made clear its intention to focus on consumers within its service area and not just serve those who roam through the state's highway system. Indeed, even without high-cost support, RCC today has constructed significant operating facilities that serve remote areas in South Dakota, well beyond cities and towns.<sup>2</sup> RCC has been successful in providing wireless services to consumers who desire a second line, but has

<sup>&</sup>lt;sup>1</sup> Exh. RCC/ 7 at 9-10.

<sup>&</sup>lt;sup>2</sup> See Exh. RCC/3.

not been able to compete in any substantial way with rural incumbent local exchange carriers ("ILECs") for customers' primary telephone service. RCC will be unable to do so without high-cost support, which a grant of this Petition will make available.

RCC faces the same obstacle to providing universal service in rural South Dakota as the ILECs. That is, sufficient network facilities cannot be constructed in most areas within rural South Dakota to provide high-quality service unless high-cost support is provided. Congress recognized this fact in creating the federal Universal Service Fund ("USF") in 1996. Moreover, Congress intended its amendments to the Communications Act of 1934 (the "Act") "to provide for a pro-competitive, de-regulatory national policy framework" aimed at fostering rapid deployment of telecommunications services to all Americans "by opening all telecommunications markets to competition. . . ."

Congress did not intend to limit the benefits of competition to urban areas where market forces alone would attract multiple carriers. As part of the 1996 legislation, Congress amended Section 214 of the Act to make universal service subsidies available to competitors willing to take on ETC obligations, including rural areas.<sup>4</sup> The Act explicitly envisions the receipt of federal universal support by competitors upon a "public interest" finding by the state commission.<sup>5</sup> Thus, Congress made clear that the advancement of universal service and the promotion of competition are dual goals that must be served equally.<sup>6</sup>

In addition, while preserving state authority to make competitive ETC ("CETC") designations and adopt universal service rules, Congress mandated that states do so "on a competitively neutral basis." Consistent with this congressional directive, the FCC adopted the

<sup>&</sup>lt;sup>3</sup> See Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 458, 104<sup>th</sup> Cong., 2d Sess. At 113.

<sup>&</sup>lt;sup>4</sup> See 47 U.S.C. §§ 214(e)(2), 254(b)(3).

<sup>&</sup>lt;sup>5</sup> See 47 U.S.C. § 214(e)(2).

<sup>&</sup>lt;sup>6</sup> See 47 U.S.C. §§ 254(b)(3), (5); Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776, 8787-89, 8791-92 (1997) ("First Report and Order").

<sup>&</sup>lt;sup>7</sup> 47 U.S.C. §§ 254(b)(3).

principle of competitive and technical neutrality to guide the implementation of the Act's universal service provisions. The principle of competitive and technological neutrality requires "that any telecommunications carrier using any technology, including wireless technology, is eligible to receive universal service support if it meets the criteria under section 214(e)(1)." RCC's designation as an ETC is consistent with this additional principle. In making ETC designations that are competitively and technologically neutral, the FCC has consistently rejected ILEC arguments that introducing a wireless CETC will harm universal service. The availability of wireless universal service offerings "can mitigate the unique risks of geographic isolation associated with living in rural communities." Moreover, the resulting competition "will result not only in the deployment of new facilities and technologies, but will also provide an incentive to the incumbent rural telephone companies to improve their existing network to remain competitive, resulting in improved service to [rural] consumers."

In its Petition, in its pre-filed testimony, and at the hearing, RCC has amply demonstrated: (1) its capability to offer universal service throughout its proposed service area; (2) a commitment to advertise the supported services; (3) that the public interest would be served

<sup>8</sup> See First Report and Order, supra, 12 FCC Rcd at 8801 ("[C]ompetitive neutrality means universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another"). See also id. at 8802 ("Our decisions here are intended to minimize departures from competitive neutrality, so as to facilitate a market-based process whereby each user comes to be served by the most efficient technology and carrier. We conclude that competitively neutral rules will ensure that such disparities are minimized so that no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition by limiting the available quantity of services or restricting the entry of potential service providers."). Consistent with this policy, dozens of wireless carriers have been designated as ETCs across the country.

<sup>&</sup>lt;sup>9</sup> See id. at 8858.

<sup>&</sup>lt;sup>10</sup> Indeed, the FCC has recognized that assertions by ILECs that competition in rural areas would harm the public "present a false choice between competition and universal service." *See First Report and Order*, 12 FCC Rcd at 8803.

<sup>&</sup>lt;sup>11</sup> Virginia Cellular, LLC, 19 FCC Rcd 1563, 1576 (2004) ("Virginia Cellular").

Western Wireless Corp., Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming, 16 FCC Rcd 48, 55 (2000) ("WWC Wyoming Order"), recon. denied, 16 FCC Rcd 19144 (2001) ("WWC Wyoming Recon. Order").

by a grant of its Petition; and (4) a commitment to work with the South Dakota Public Utilities Commission ("SDPUC", "Commission") to provide additional information that may be required and to comply with SDPUC's rules.

The public benefits that will result from granting RCC the ability to compete on a level playing field with ILECs are compelling. Consumers in rural areas who receive improved service as a result of RCC making substantial investments in its network will have an additional choice among *primary* service offerings. In every area where RCC is able to introduce customer choice, it will trigger a competitive response from ILECs, who will improve customer service, introduce new service offerings, and likely play to their strength by speeding deployment of DSL and other high-speed data services to compete with wireless technology.

### I. <u>DISCUSSION</u>

## A. RCC MEETS THE REQUIREMENTS TO BE DESIGNATED AS AN ETC IN THE STATE OF SOUTH DAKOTA.

1. RCC Offers the Nine Supported Services Throughout Its Proposed ETC Service Areas as Required by Federal Law.

To be designated as an ETC, 47 C.F.R. § 54.101(a) requires RCC to demonstrate that it is capable of providing nine services throughout its proposed service area, <sup>13</sup> specifically: (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multi-frequency ("DTMF") signaling or its functional equivalent; (4) single-party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to

The only objection to RCC's strong showing regarding its capability to provide the supported services came in SDTA witness Glenn Brown's statement that a competitive ETC must "serve throughout the area within a reasonable period of time." Tr. Vol. 2 at 212, *l.* 24 - 213 *l.* 3. This claim appears to contradict federal law, which provides that "dead spots" are presumed in any network and that an ETC petitioner need not provide service throughout a proposed ETC service area at the time of its petition. See Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling, 15 FCC Rcd 15168, 15174-75 (2000) ("South Dakota Preemption Order"). See also Virginia Cellular, supra, 19 FCC Rcd at 1573-74; RCC Holdings, Inc., Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama, 17 FCC Rcd 23532, 23539 (2002) ("RCC Holdings") (recon. pending) (confirming that the presence of "dead spots" in a cellular coverage are presumed to exist under the FCC's rules and do not affect the analysis of whether an ETC applicant is 'willing or capable of providing acceptable levels of service' throughout its service area.).

interexchange service; (8) access to directory assistance; and (9) toll limitation for qualifying low-income customers. RCC has demonstrated that it meets all nine requirements. The Intervenors, South Dakota Telecommunications Association and various ILECs (hereinafter jointly referred to as "SDTA") have not rebutted RCC's demonstration that it provides all the required services. In granting ETC status to RCC, several state commissions and the FCC have previously found that RCC offers the nine supported services. <sup>15</sup>

RCC will use the same high-quality network infrastructure to offer the supported services in the areas served by Qwest and SDTA member companies. RCC has also committed under oath to use high-cost support only to construct, upgrade and maintain its network facilities and services in high-cost areas as required by law.<sup>16</sup>

Earlier this year, the FCC designated Virginia Cellular to be an ETC in nonrural and rural areas in Virginia. <sup>17</sup> Based on Virginia Cellular's certification that it would offer the nine supported services, the FCC ruled that the company was qualified to be an ETC, rejecting rural ILEC objections. <sup>18</sup> RCC has made similar commitments regarding its basic qualifications. As discussed further below, RCC fully complies with all federal requirements to be an ETC throughout its proposed ETC service area.

<sup>14</sup> Exhs. RCC/1 at 4-7, RCC/19 at 1-5.

<sup>&</sup>lt;sup>15</sup> RCC Minnesota, Inc., Docket No. 04-RCCT-338-ETC (Kansas Corp. Comm'n, Sept. 30, 2004) ("RCC Kansas Order"); RCC Minnesota, Inc., Docket 1083 (Oregon PUC, June 24, 2004) ("RCC Oregon Order") RCC Holdings, supra; RCC Minnesota, Inc., Order Granting Petition, Washington Util. and Transp. Comm., Docket No. UT-023033 (Aug. 14, 2002) ("RCC Washington Order"); RCC Minnesota, Inc. et al., Docket No. 2002-344 (Maine PUC May 13, 2003) ("RCC Maine Order"); RCC Minnesota, Inc. and Wireless Alliance, LLC, Order Granting Approval, Docket No. 6181/M-02-1503 (Minn. PUC Oct. 15, 2003) ("RCC Minn. Final Order"); RCC Atlantic, Inc., Order, Docket No. 5918 (Vt. Pub. Serv. Bd., Nov. 14, 2003) ("RCC Vermont Nonrural Order"), Docket No. 6394 (Vt. Pub. Serv. Bd., Sept. 29, 2004) ("RCC Vermont Rural Order").

<sup>&</sup>lt;sup>16</sup> See Petition at Exh. E.

<sup>&</sup>lt;sup>17</sup> See Virginia Cellular, supra.

<sup>&</sup>lt;sup>18</sup> *Id.* at 1570 ("We find that Virginia Cellular has demonstrated through the required certifications and related filings, that it now offers, or will offer upon designation as an ETC, the services supported by the federal universal service support mechanism.")

## 2. <u>RCC Will Advertise the Availability of Supported Services Throughout its Proposed Service Area.</u>

As required by 47 C.F.R. § 54.201(d)(2) of the FCC's rules, RCC has certified to its commitment to advertise the supported services throughout its proposed ETC service area. <sup>19</sup> RCC has also committed to reach out to the communities it serves and provide Lifeline and Link-Up services to low income customers. <sup>20</sup> RCC's certification as to its commitment is consistent with that which the FCC has accepted in a number of cases, including *Virginia Cellular*. <sup>21</sup>

## B. GRANT OF RCC'S PETITION WILL SERVE THE PUBLIC INTEREST IN SOUTH DAKOTA.

A central tenet of federal universal service policy is that consumers in rural areas are entitled to the same kind of choices of telecommunications services as those in urban areas.<sup>22</sup> RCC's customers pay into the high-cost fund and they are entitled to receive the benefits that the fund provides.<sup>23</sup> Throughout this proceeding, SDTA has revealed that it is interested in only one thing: preventing RCC from improving its service in rural South Dakota so that its constituent companies can retain their monopoly on the local exchange marketplace indefinitely.<sup>24</sup> Consumers in rural South Dakota deserve more, and they will get much more if RCC's Petition is granted as proposed.<sup>25</sup>

<sup>&</sup>lt;sup>19</sup> See Petition at p. 7.

<sup>&</sup>lt;sup>20</sup> *Id*.

<sup>&</sup>lt;sup>21</sup> Virginia Cellular, supra, 19 FCC Rcd at 1574.

<sup>&</sup>lt;sup>22</sup> See 47 U.S.C. § 254(b)(3).

<sup>&</sup>lt;sup>23</sup> Today, wireless consumers nationwide pay roughly \$1.00 per month in universal service support, or roughly \$2 billion per year. (Average cellular revenue of \$40.00 multiplied by the federal safe harbor of 28%, multiplied by a 10% contribution factor = \$1.12 multiplied by approximately 173,000,000 lines in service multiplied by 12).

<sup>&</sup>lt;sup>24</sup> Rural ILEC concerns about growth in the size of the federal universal service fund due to designation of competitive ETCs are disingenuous. SDTA has expressed no concern about the fact that the modified embedded cost system implemented in the FCC's RTF Order has added \$1.26 billion to rural ILEC support. Exh. RCC/7 at 34-35. On cross-examination, Mr. Wood confirmed that no part of this increase is attributable to Interstate Access reform. Tr. Vol. 1 at 99.

<sup>&</sup>lt;sup>25</sup> For convenient reference, RCC has provided staff and Intervenors' counsel with binders containing relevant decisions from the FCC and from jurisdictions across the country.

1. A Proper Definition of the "Public Interest" Will Establish Conclusively That RCC's Petition Meets the Public Interest Prerequisite for ETC Designation in Rural Areas in South Dakota.

The public interest must be determined by following guidance provided by Congress in adopting the Telecommunications Act of 1996 ("1996 Act") and the FCC in its enabling orders. The overarching principles embodied in the 1996 Act are to "promote competition and reduce regulation . . . secure lower prices and higher quality services . . . and encourage the rapid deployment of new telecommunications technologies." In its implementing orders, the FCC ruled that the pro-competitive and deregulatory directives from Congress required universal service support mechanisms to be competitively neutral and portable among eligible carriers. 28

The Commission must determine whether designation of RCC as an ETC will promote the principles embodied in the 1996 Act, specifically the goal of ensuring that consumers in rural, insular, and high-cost areas "have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and are available at rates that are reasonably comparable to rates charged for similar services in urban areas." <sup>29</sup> In evaluating whether RCC's designation will fulfill these objectives, SDPUC may properly consider, for example, RCC's intent and ability to bring high-quality service and a broad array of rate plans and local calling options to South Dakota consumers. SDPUC also can and should

<sup>&</sup>lt;sup>26</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996). See also First Report and Order, supra; Federal-State Joint Board on Universal Service, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20432 (1999) ("Ninth Report and Order"); Federal-State Joint Board on Universal Service, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking, 16 FCC Rcd 11244 (2001) ("Fourteenth Report and Order"). See also NAACP v. FPC, 425 U.S. 662, 669 (1976); accord, e.g., Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413, 1427 (D.C. Cir. 1983); Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC, 595 F.2d 621, 628 & n.22 (D.C. Cir. 1978).

<sup>&</sup>lt;sup>27</sup> 1996 Act (preamble).

<sup>&</sup>lt;sup>28</sup> First Report and Order, supra, 12 FCC Rcd at 8801, 8861-62; Ninth Report and Order, supra, 14 FCC Rcd at 20480.

<sup>&</sup>lt;sup>29</sup> See 47 U.S.C. § 254(b)(3) (emphasis added).

consider the competitive response that may result from upgrading and expanding RCC's network, which may "provide incentives to the incumbent to implement new operating efficiencies, lower prices, and offer better service to its customers."<sup>30</sup>

Although the FCC's views on the public interest test to be applied in ETC designation cases, as expressed in *Virginia Cellular*, are not binding on this Commission, they are relevant. The FCC ruled that the following factors may be taken into consideration when assessing the public interest:

- increased competitive choice;
- the unique advantages and disadvantages of the competitor's service offering,
- any commitments made regarding quality of telephone service,
- the competitive ETC's ability to satisfy its obligation to serve the designated service areas within a reasonable time frame, and
- the impact of the designation on the universal service fund.<sup>31</sup>

Because the Commission may follow the federal scheme for its ETC designations, RCC will include in its discussion below how RCC's designation will accomplish each of the FCC's public interest objectives throughout its proposed ETC service area.

2. <u>Applying the Proper Public Interest Test Makes It Clear That RCC's Petition</u>
<u>Should be Granted Throughout RCC's Licensed Service Area in South Dakota.</u>

RCC witness Don J. Wood aptly stated the proper question before this commission, Will RCC/WA offer services that provide benefits to consumers?, and Is there some fact or issue that is specific to RCC/WA, or to the service areas within which it seeks an ETC designation in South Dakota, that would outweigh those benefits? (emphasis in original)<sup>32</sup> As detailed in the record,

Western Wireless Corp., 16 FCC Rcd 48, 57 (2000) ("Western Wireless Wyoming Order"), recon. denied, FCC 01-311 (rel. Oct. 19, 2001) ("Western Wireless Wyoming Recon. Order").

<sup>&</sup>lt;sup>31</sup> Virginia Cellular, supra, 19 FCC Rcd at 1575-76.

<sup>&</sup>lt;sup>32</sup> Exh. RCC/7 at 9.

there are numerous public interest benefits which will accrue to South Dakota consumers as a result of RCC's designation.

### a. Granting RCC's Petition will advance universal service in South Dakota.

Congress mandated that consumers in rural areas should receive choices in telecommunications services, in both quality and price, that are similar to those available in urban areas.<sup>33</sup> RCC has explained how the provision of high-cost support will enable RCC to deliver to rural consumers higher quality networks that will provide them with the kinds of choices now available in urban areas.<sup>34</sup> As RCC's network improves, the nine supported services will be extended throughout its service area.

The FCC has put in place every incentive for CETCs to construct additional facilities in high-cost areas. In particular, the rules permit a CETC to get support only after it gets a customer.<sup>35</sup> Thus, to succeed in obtaining customer revenue and high-cost support, RCC must first construct facilities, then convince consumers to choose its service. RCC's network already reaches deep into South Dakota's rural areas. Through its six-step process for provisioning service, RCC has demonstrated its commitment to serve throughout its proposed ETC service area within a reasonable time upon reasonable request.<sup>36</sup> Grant of this Petition will advance universal service in South Dakota.

## b. Granting RCC's Petition will lead to improved service quality.

Improving service quality and consumer choice is critical to advancing universal service. Today, RCC's network is reliable. Consumers may purchase a variety of high-quality handsets to gain access to RCC's network. Optional accessories are available to facilitate use of the

<sup>&</sup>lt;sup>33</sup> 47 U.S.C. § 254(b).

<sup>&</sup>lt;sup>34</sup> Exh. RCC/1 at 6-7.

<sup>&</sup>lt;sup>35</sup> See 47 C.F.R. § 54.307(a).

<sup>&</sup>lt;sup>36</sup> See Virginia Cellular, supra, 19 FCC Rcd at 1570-71. In addition, since a carrier may fulfill this responsibility through a combination of facilities-based service and resale, efficient entry is promoted because a competitor is not likely to enter with facilities in areas where it will be the higher cost provider, but can use resale.

equipment.<sup>37</sup> To ensure the reliability of its network, RCC employs a staff of full time network technicians, including an experienced engineering and technical support team. This team provides emergency support 24 hours a day, seven days a week ("24/7"), with a typical response time of less than one hour.<sup>38</sup> RCC's system has diesel generator backups at its switch, battery backups at its cell sites, and two portable generators to supplement back-up batteries at individual cell sites indefinitely.<sup>39</sup> Each cell site is monitored 24/7 and equipped with alarms to alert technicians of problems.<sup>40</sup> On the stand, Mr. Gruis confirmed that all network elements are connected to a central alarming platform to generate alarms if there is a malfunction.<sup>41</sup> Moreover, if something happens in the middle of the night, the company's orders to its technicians are, "You go fix it. You are done working when it works again...If it's a critical alarm, they get up and they go take care of it, and they are off when it is fixed."<sup>42</sup>

RCC currently has a call completion rate of roughly 98% during the busy hour, which the company believes to meet or exceed that of most other wireless service offerings and is very competitive with typical landline service. At the hearing, Mr. Gruis confirmed that the 98% rate is at the busy hour for each cell site the company operates. In areas where the company's signal is not strong, typically the more remote portions of its ETC service area, RCC can and will use high-cost support to improve its service to South Dakota consumers.

<sup>&</sup>lt;sup>37</sup> Exh. RCC/5 at 7.

 $<sup>^{38}</sup>$  *Id.* at 5.

<sup>&</sup>lt;sup>39</sup> *Id*.

<sup>&</sup>lt;sup>40</sup> *Id*.

<sup>&</sup>lt;sup>41</sup> Tr. Vol. 2 at 80.

<sup>&</sup>lt;sup>42</sup> Tr. Vol. 2 at 81.

<sup>&</sup>lt;sup>43</sup> Exh. RCC/5 at 6.

<sup>&</sup>lt;sup>44</sup> Tr. Vol. 2 at 81-82.

<sup>&</sup>lt;sup>45</sup> See, e.g., Tr. Vol. 2 at 82-83 (Gruis testimony that four new cell sites proposed by RCC represent its initial commitment and that the company will keep its commitment to use high-cost

RCC also provides a high level of customer service as a result of having to operate in a highly competitive marketplace.<sup>46</sup> No party presented any evidence that RCC has had any customer complaints that have had to be resolved through formal proceedings with the FCC, SDPUC, or other adjudicative bodies.<sup>47</sup> All service quality comments are forwarded to the company's operations department to enable it to monitor performance and improve customer service.<sup>48</sup> The company's customer service representatives are available toll free via wireline and airtime-free via wireless 24/7. Service is also available in person or through the Internet.<sup>49</sup>

RCC provides 911 service to all callers accessing its network. It has completed E-911 Phase I in some areas of the state is ready to upgrade its system to Phase II as soon as PSAPs have systems capable of passing Phase II data and make a request.<sup>50</sup>

RCC has made specific commitments to provision service to requesting customers, to respond to all reasonable requests for service, and to report annually to the Commission how it is using high-cost support to achieve these goals.<sup>51</sup> When a consumer requests service, RCC will work through a six-step process to provision service and, if necessary, resolve any customer complaints through SDPUC.<sup>52</sup>

support in South Dakota that it anticipates growing its network every year with high-cost support.)

<sup>&</sup>lt;sup>46</sup> See Exh. RCC/5 at 6.

<sup>&</sup>lt;sup>47</sup> See Exh. RCC/1 at 19 ll. 1-2.

<sup>&</sup>lt;sup>48</sup> Exh. RCC/5 at 6 *ll.* 22-24.

<sup>&</sup>lt;sup>49</sup> Exh. RCC/5 at 7.

<sup>&</sup>lt;sup>50</sup> Tr. Vol. 2 at 6-7.

<sup>&</sup>lt;sup>51</sup> Exhs. RCC/5 at 8-10; RCC/1 at 12 *ll.* 16-23; RCC/1 at 16 *ll.* 7-11. See South Dakota Preemption Order, supra, 15 FCC Rcd at 15174-75 ("A new entrant, once designated as an ETC, is required, as the incumbent is required, to extend its network to serve new customers upon reasonable request. We find, therefore, that new entrants must be allowed the same reasonable opportunity to provide service to requesting customers as the incumbent LEC, once designated as an ETC.")

<sup>&</sup>lt;sup>52</sup> Exh. RCC/5 at 9-10; Tr. Vol. 1 at 108 ll. 5-12. This six-step process is consistent with the service provisioning commitment approved by the FCC in *Virginia Cellular*, *supra*, 19 FCC Rcd at 1570-71.

RCC has stated a specific commitment to continue to improve its network with high-cost support. Its current top priorities are to expand service in the communities identified in Mr. Gruis' direct prefiled testimony and the exhibits thereto, and then to build additional sites further down on its list of areas needing improved coverage as more funding becomes available. Another top priority is to overlay its network with the next generation digital GSM platform, which will provide improved voice quality and system capacity, as well as laying the foundation for a high-speed mobile data network. 4

RCC provides consumers with high-quality service in every area where it has strong signal strength. None of the RCC's testimony on service quality was challenged on cross-examination. Where RCC desires to improve service in remote parts of its service area, RCC is in the same position as rural ILECs—it needs support to do so.<sup>55</sup> It is axiomatic that as RCC constructs additional cell sites in high-cost areas to improve the quality and ubiquity of its radio frequency ("RF") signal, its customers will have a greater choice among service providers and will receive more reliable service. Some will have the option to receive RCC's service for the first time. Others will see service quality and reliability improvement such that they may choose RCC's service instead of ILECs, as opposed to confining their use of RCC's service to an ancillary communications tool.<sup>56</sup>

The improved service quality, reliability, and increased choices to rural South Dakota will be dramatic. RCC's sworn and unrefuted testimony concerning its high-quality service provides SDPUC with a compelling basis to conclude that granting ETC status is in the public interest.

<sup>&</sup>lt;sup>53</sup> Exh, RCC/5 at 11.

<sup>&</sup>lt;sup>54</sup> Tr. Vol. 2 at 68 *ll*. 1-16.

<sup>&</sup>lt;sup>55</sup> Exh. RCC/5 at 11 *ll*. 1-3; Tr. Vol. 2 at 90, *ll*. 13-22.

<sup>&</sup>lt;sup>56</sup> RCC's propagation map is compelling evidence as to how many areas within its FCC-licensed service area can be improved with the introduction of new cell sites. *See* Exh. RCC/3; Tr. Vol. 2 at 33 *l.* 18 - 38 *l.* 3.

## c. Granting RCC's Petition will Increase Consumer Choice.

Although RCC's service currently provides consumers with choices that are not available from rural ILECs, or in some cases are available *only* from rural ILECs, consumers can only take advantage of RCC's service in areas where network facilities have been constructed. High-cost support will permit RCC to extend it service so as to increase consumer choice in more areas in South Dakota.

In areas where new network facilities are constructed, RCC will be able to deliver mobility, which the FCC and several states have found to be an important public interest benefit.<sup>57</sup> RCC also provides consumers with a variety of local calling plans, all of which it believes will cover much larger geographic areas than plans available from competing ILECs.<sup>58</sup> RCC offers dozens of rate plans that meet the needs of almost any consumer. Those who want a local calling area that permits them to avoid toll charges, or the ability to use their phone outside of their home, will benefit from improvements in RCC's network. RCC offers rate plans tailored to consumers, whether it be a person who wishes to make a few calls or one who uses a phone for a thousand or more minutes per month. RCC also offers a variety of features, such as Utext text messaging, Nationwide toll-free #, Group Ring, Voice Dial, Mobile to Mobile Unlimited (which is a program that provides unlimited mobile to mobile calling minutes between customers of the Applicants), and other features.<sup>59</sup>

In some parts of South Dakota, ranchers, farmers, and other residents currently have no or limited choice for telephone service. In most of the geographic area of South Dakota wireline service is not available, unless a caller is located at the end of a wire.

<sup>&</sup>lt;sup>57</sup> See, e.g., Virginia Cellular, supra, 19 FCC Rcd at 1576; ADT Alaska Order, supra, at 13; RCC Kansas Order, supra, at pp. 24-25; RCC Oregon Order, supra, at pp. 8-9; RCC Vermont Rural Order, supra, at pp. 35-36; Easterbrooke Cellular Corp., Docket No. 03-0935-T-PC (W. Va. PSC, May 14, 2004) at p. 51 ("Easterbrooke W.V. Rural Order").

<sup>&</sup>lt;sup>58</sup> See Exh. RCC/1 at pp. 5-6.

<sup>&</sup>lt;sup>59</sup> See id. at p. 5.

A grant of RCC's Petition will enable it to improve its service or to offer its service to many rural locations for the first time. RCC has committed to use high-cost support to improve its infrastructure in rural South Dakota, which improvements will deliver the benefits outlined above, to the benefit of consumers.

## d. Granting RCC's Petition Will Result in Health and Safety Benefits.

People living in rural areas increasingly depend on mobile phones to provide critical communications needs. It is self-evident that each time RCC adds a cell site or increases channel capacity, the number of completed calls, including important health and safety calls, will increase.<sup>60</sup>

The public safety benefits from improved wireless services scarcely bear mention. All wireless carriers are required to implement Phase II enhanced 911 ("E-911") service over the next several years. E-911, which permits a caller to be located and tracked, will be useless in areas where RF is weak or non-existent. Thus, for every cell site that RCC constructs, the reliability and performance of RCC's basic 911 service will improve immediately and E-911 service will improve as PSAPs come on line.

It would be difficult to overstate the important public interest benefits relating to health and safety that will be realized by supporting improvement to critical wireless infrastructure in these rural areas.

e. <u>Granting RCC's Petition Will Stimulate a Competitive Response By ILECs That Will Benefit the Public.</u>

There is no question that if RCC is designated as an ETC and is able to compete for local exchange customers, it will spur a competitive response from SDTA members. Some, and maybe all of the following things can be expected to occur: (1) service quality and customer service will improve; (2) new investments in plant will be made; (3) in areas where high-speed data (DSL) is not available, it will be deployed more quickly; (4) wider local calling areas,

<sup>&</sup>lt;sup>60</sup> See Exh. RCC/5 at p. 10 *ll*. 16-21.

bundled service offerings, and lower prices overall will be introduced.<sup>61</sup> ILECs will take these steps to ensure that they remain competitive with RCC and continue to retain and attract customers.

Without federal high-cost support being made available to improve and expand service to rural consumers, RCC will not be able to compete for primary service in a way that would force a competitive response from SDTA members. Indeed, line counts of rural ILECs in South Dakota, as reported to USAC over the past several years, have been mostly stable with a significant overall increase, indicating that no competitor has made substantial inroads into their monopolies. <sup>62</sup>

RCC has outlined above how it offers customers a wide variety of choices. If the playing field for high-cost support is leveled, RCC will be able to compete with ILECs for primary telephone service, which will undoubtedly trigger a competitive response.

e. <u>A grant of RCC's Petition will not burden the federal universal service support mechanism.</u>

It its recent *Virginia Cellular* decision, the FCC indicated that whether the high-cost fund would significantly increase as a result of the designation could be a factor in the designation process. The FCC did not provide state commissions with any guidance as to what would amount to "significant." However, it is clear that no individual designation anywhere in the country is likely to cause a significant burden on the federal fund, and most certainly not here in South Dakota. First, over 90% of the fund goes to rural ILECs. Second the high-cost portion of

<sup>&</sup>lt;sup>61</sup> "There will be both short term and long term benefits of bringing further competition to rural consumers. End users will benefit in the short term from a choice of suppliers that represent different technologies, and can choose the technology that best meets their needs. They can also select from a much broader array of service and pricing plans, and again can choose the plan that best meets their individual needs. Over the longer term, consumers will benefit as competitive market forces act to make all providers, including the rural ILECs, more efficient and responsive to customer needs." Exh. RCC/7 at 21 *ll.* 9-15. *See also* Tr. Vol. 2 at 89 *l.* 25 - 90 *l.* 22.

For example, the aggregate number of loops reported by Roberts County Telephone Cooperative, Sioux Valley Tel. Co., and Union Tel. Co. increased from 9,258 for the first quarter of 2000 to 10,011 for the first quarter of 2005. The SDPUC may take official notice of this data, which is available on the "FCC Filings" page of USAC's web site at www.universalservice.org.

the fund is now over \$3 billion, which makes it impossible that the designation of any CETC in a single state will have anything but a negligible impact on the fund. RCC is only projected to receive approximately \$1.5 million in annual federal high-cost support, or approximately 0.04% of the federal fund.<sup>63</sup>

The negligible impact of RCC's designation in South Dakota on the fund must be weighed against the significant benefits that the designation will bring to the state. At this stage, it is impossible to conclude that this designation will unduly burden federal support mechanisms or that the projected burden is not outweighed by the benefits that will accrue to South Dakota consumers. This matter is properly before the FCC the agency charged with managing and administering the federal high-cost fund.

f. A grant of RCC's Petition will promote affordable telephone service in rural South Dakota and deliver economic development benefits.

As many states have ruled, attempting to compare wireless and wireline rates is not possible because they are different services and features such as mobility do not exist in the wireline world.<sup>64</sup> The FCC has never conducted an affordability analysis in an ETC designation proceedings because affordability is presumed in competitive markets.<sup>65</sup> As RCC witness Don

<sup>&</sup>lt;sup>63</sup> Tr. Vol. 2 at p. 7 *ll.* 9-16.

<sup>&</sup>lt;sup>64</sup> See, e.g., Midwest Wireless Communications, LLC, OAH Docket No. 3-2500-14980-2, PUC Docket No. PT6153/AM-02-686, Findings of Fact, Conclusions of Law, and Recommendation at ¶¶ 43-44 (Minn. ALJ Dec. 31, 2002) ("Midwest Minnesota ALJ Decision"), aff'd by Midwest Minnesota Order, supra ("Wireless networks are not limited by traditional exchange areas, and wireless carriers do not and cannot compete on landline terms. They have to compete for local service by offering something different and more desirable to consumers, such as mobility, larger local calling areas, or more flexible rate plans, and there is nothing in the law that requires a wireless carrier's offerings to be priced comparably to what is offered by an ILEC. A wireless carrier's rate plans simply cannot be compared service-by-service or dollar-for-dollar with an ILEC's."); RCC Maine Order, supra; Smith Bagley, Inc., Utility Case No. 3026, Recommended Decision of the Hearing Examiner and Certification of Stipulation at 21 (Aug. 14, 2001) ("SBI New Mexico Decision"), aff'd, Final Order (N.M. Pub. Reg. Comm. Feb. 19, 2002).

<sup>&</sup>lt;sup>65</sup> See, e.g., Virginia Cellular, supra. See also Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 FCC 2d 1, 31 (1980) ("[F]irms lacking market power simply cannot rationally price their services [or impose terms] in ways which [are unjust, unreasonable or discriminatory.] [A]

Wood emphasized in his prefiled testimony, RCC has strong incentives to offer service at attractive prices because it will receive support only for customers it acquires and retains.<sup>66</sup>

Nevertheless, under any objective standard, RCC's service offerings promote affordable telephone service for rural consumers. Most of RCC's rate plans include a number of vertical features including caller ID and call waiting, for prices that are competitive with rural ILECs. 67 Indeed, if RCC's prices are not competitive, consumers will choose rural ILECs—whose rates are supported by subsidies—and RCC will not get high-cost support. Perhaps most important, when RCC's ETC Petition is granted low-income consumers throughout RCC's service area will have an additional choice of telephone service provider, as RCC will be eligible to offer federal Lifeline and Link-up discounts.

The economic benefits that can flow to rural areas as a result of improved wireless service are undeniable, as RCC witness Don Wood made clear in his prefiled testimony:

When making investment and relocation decisions, companies consider the availability telecommunications services in an area. Reliable voice services, data services, and wireless services with sufficient coverage all play a role in this process. In order to compete with their urban and suburban counterparts to attract investment and jobs, rural areas need for these services to be available. 68

non-dominant competitive firm . . . will be incapable of violating the just and reasonable standard....If it charges unreasonably high rates or imposes unreasonable terms or conditions in conjunction with the offering, it would lose its market share as its customers sought out competitors whose prices and terms are more reasonable.")

<sup>&</sup>lt;sup>66</sup> See Exh. RCC/7 at 68 *l*. 15 - 69 *l*. 1.

<sup>&</sup>lt;sup>67</sup> See Exh. Intervenor/9. As of May, 2004, RCC's Rover plan offers a mobile service that includes unlimited local calling throughout a metro area for \$32.95 per month. RCC's MyZone Unlimited plan offers a mobile service that includes unlimited local calling throughout a regional local calling area for \$38.00.

<sup>&</sup>lt;sup>68</sup> Exh. RCC/7 at 23 *ll*. 6-12.

## 3. <u>SDPUC should follow the FCC and numerous states that have designated wireless carriers as competitive ETCs.</u>

In sum, RCC has met its burden to make a threshold showing that a grant of its Petition would serve the public interest. It has offered credible evidence that it can offer reliable and affordable service throughout its proposed ETC service area, including features such as mobility which are not available from ILECs. It has demonstrated compelling public interest benefits that will result, including increased customer choice and improvement of critical E-911 functionality. The ILECs have completely failed to present any credible or specific evidence as to how consumers would be harmed by a grant of RCC's Petition.

This Commission should join the FCC and nearly every state that have rejected ill-founded opposition of ILECs to designation of CETCs and grant RCC's Petition.<sup>69</sup>

## C. THE SDPUC SHOULD ADOPT RCC'S PROPOSED ETC SERVICE AREA DEFINITION.

RCC has proposed an ETC service area that is coterminous with the boundaries of its FCC-licensed service area. The boundaries of its licensed service area naturally differ from the study area boundaries of ILECs, and several ILECs' study areas are only partially within its licensed service area. As described in Section D below, with respect to the rural ILECs whose

<sup>&</sup>lt;sup>69</sup> See, e.g., RCC Oregon Order, supra; U.S. Cellular Corp., Docket No. 1084 (Oregon PUC, June 24, 2004); NPCR, Inc. d/b/a Nextel Partners, Case No. 2003-00143 (Ky. PSC, Dec. 16, 2004); Virginia Cellular, supra; RCC Holdings, supra; Pine Belt Cellular, Inc. and Pine Belt PCS, Inc., CC Docket 96-45, Memorandum Opinion and Order, 17 FCC Rcd. 9589 (rel. May 24, 2002) ("Pine Belt Order"); Western Wireless Wyoming Recon. Order, supra, 16 FCC Rcd at 19152; SBI New Mexico Decision, supra; RCC Washington Order, supra; Smith Bagley, Inc., Docket No. T-02556A-99-0207 at p. 12 (Ariz. Corp. Comm'n Dec. 15, 2000) ("SBI Arizona Order"); Midwest Wireless Iowa, L.L.C., Docket No. 199 IAC 39.2(4) (Iowa Util. Bd. July 12, 2002) ("Midwest Iowa Order"); ALLTEL Communications, Inc., Case No. U-13765 at p. 11 (Mich. PSC Sept. 11, 2003) ("ALLTEL Michigan Order"); Cellular South Licenses, Inc., Docket No. 01-UA-0451 at pp. 7-8 (Miss. PSC Dec. 18, 2001)("Cellular South Mississippi Order"); WWC License LLC d/b/a Cellular One, Docket No. 00-6003 (Nev. PUC Aug. 22, 2000) ("WWC Nevada Order"); WWC Texas RSA L.P., PUC Docket No. 22295, SOAH Docket No. 473-00-1168 (Tex. PUC Oct. 30, 2000)("WWC Texas Order"); Guam Cellular and Paging, Inc. d/b/a Guamcell Order"); Cellco Partnership d/b/a Bell Atlantic Mobile, DA 00-2895 (C.C.B. rel. Dec. 26, 2000) ("Cellco Order").

<sup>&</sup>lt;sup>70</sup> See Exh. RCC/5 at p. 1; Tr. Vol. 1 at 90 *ll.* 15-17.

study areas are only partially within RCC's proposed ETC service area, RCC requests redefinition of each affected rural ILEC's service area such that each wire center is a separate service area.

In some cases, RCC's licensed service area covers only part of a wire center. In its *Highland Cellular* decision,<sup>71</sup> the FCC declined to designate a competitive ETC for a portion of a rural ILEC wire center, declaring that the wire center is "an appropriate minimum geographic area for ETC designation[.]" However, *Highland Cellular* is currently on appeal, and RCC believes the FCC's conclusions regarding minimum geographic areas is legally unsound. The decision to limit ETC designations to entire wire centers directly contradicts earlier FCC decisions, including the order designating RCC as an ETC in Alabama, in which the FCC stated:

We conclude that it is in the public interest to designate RCC Holdings as an ETC for the portions of these wire centers it is able to serve. Our analysis of the public interest--that is, the consumer benefits, potential harm to consumers, and the effect of this ETC designation on rural telephone companies--does not change based on RCC Holdings' ability to serve only a portion of three of the affected wire centers. The affected consumers in these wire centers will benefit from the provision of competitive service. Further, parties have offered no evidence of harm regarding RCC Holdings' ability to partially serve three of the affected rural wire centers. The affected rural wire centers.

Notwithstanding *Highland Cellular*, several other state commissions have declined to follow the FCC's logic on this issue, recognizing that it is not competitively neutral to force

<sup>&</sup>lt;sup>71</sup> Highland Cellular, Inc., 19 FCC Rcd 6422 (2004) ("Highland Cellular").

<sup>&</sup>lt;sup>72</sup> *Id.* at 6438.

The FCC based its decision on two premises: (1) that "rural carrier wire centers typically correspond with county and/or town lines" and (2) that "requiring a competitive ETC to serve entire communities will make it less likely that the competitor will relinquish its ETC designation at a later date." The first rationale lacks factual support because, in RCC's experience, wire centers often ignore county boundaries and town lines, while wireless markets areas often track those lines. The second rationale is similarly suspect, because the likelihood of any carrier (incumbent or competitive) relinquishing its ETC status depends not on its coverage of a particular "community" but on whether it has a sustainable business plan to offer service throughout its designated service area.

<sup>&</sup>lt;sup>74</sup> RCC Holdings, supra, 17 FCC Rcd at 23546. See also Tr. Vol. 2 at 118 l. 17 – 119 l. 8.

competitive carriers to adhere to boundaries specific to another class of carrier or another technology. For example, in a recent ETC designation order, the Washington Utilities and Transportation Commission ("WUTC") declined to follow *Virginia Cellular*, noting that the FCC "intended to apply the framework in that decision to other ETC designations pending before the FCC. The FCC did not—indeed cannot—bind state commissions to its analysis." Similarly, in comments submitted to the FCC regarding the impact of *Highland Cellular* and *Virginia Cellular* on pending ETC designations and service area redefinition requests, the Colorado Public Utilities Commission ("CPUC") and the Minnesota Public Utilities Commission ("MPUC") stood by their previous decisions to designate competitive ETCs throughout their requested service areas, including situations where only partial wire centers were served. 76

Nonetheless, in the event this Commission decides that it cannot designate an ETC in portions of rural ILEC wire centers, RCC has eliminated all such partial wire centers from its proposed ETC service area. Specifically, on the revised Exhibit D to the Petition – introduced at hearing as part of Exhibit RCC/4<sup>77</sup> – RCC has indicated with a "Y" the partial rural ILEC wire centers it commits to serve fully, and an "N" for the partial rural ILEC wire centers from which it has withdrawn its request for designation. RCC will use any number of options to serve the remaining portions of the wire centers indicated with a "Y", including offering service via resale or roaming.<sup>78</sup>

<sup>&</sup>lt;sup>75</sup> AT&T Wireless PCS of Cleveland et al., Docket No. UT-043011 at pp. 10-11 (Wash. Util. & Transp. Comm'n, April 13, 2004) ("AT&T Washington Order").

<sup>&</sup>lt;sup>76</sup> See Petition by the Colorado Public Utilities Commission, Pursuant to 47 C.F.R. § 54.207(c), for Commission Agreement in Redefining the Service Area of CenturyTel of Eagle, Inc., a Rural Telephone Company, Supplement to the Petition Filed by the Colorado Public Utilities Commission, CC Docket No. 96-45 (filed May 14, 2004) at p. 5; Petition by the Minnesota Public Utilities Commission for Agreement with Changes in Definition of Service Areas for Exchanges Served by CenturyTel et al., Supplemental Comments of the Minnesota Public Utilities Commission, CC Docket No. 96-45 (filed May 14, 2004) at p. 3.

<sup>&</sup>lt;sup>77</sup> See Tr. Vol. 1 at 32-35.

<sup>&</sup>lt;sup>78</sup> See Tr. Vol. 1 at 74, *ll.* 9-17.

Additionally, with respect to wire centers that straddle state boundaries, this Commission is well within its authority to designate RCC in the portion located within South Dakota. The state of South Dakota has no authority over the Minnesota portion of the wire centers and Minnesota has no authority over the South Dakota portion. Likewise for the wire centers that incur into North Dakota. The only logical solution is for each state to have the ability to designate an ETC in the portion of a wire center that is found within its borders. For example, the FCC has designated RCC as an ETC in Alabama within portions of wire centers that straddle state boundaries. The FCC has also designated Western Wireless in Wyoming within portions of wire centers that straddle Wyoming's boundaries with Nebraska, Montana and South Dakota. Accordingly, RCC requests this Commission to exercise jurisdiction over South Dakota territory, consistent with decisions rendered by the FCC and in other states.

The Commission should designate RCC an ETC throughout its licensed area, including those wire centers only partially covered by its licensed area. However, should the Commission require RCC serve throughout a wire center to be designated in that wire center, RCC shall serve throughout certain wire centers that straddle its license area. For clarity, RCC provides below two tables of the rural wire centers, derived from Exhibit D of RCC's hearing Exhibit 4 and RCC Exh. 14, and RCC's testimony.<sup>81</sup> Table 1 shows the wire centers that RCC

<sup>&</sup>lt;sup>79</sup> See RCC Holdings, supra, 17 FCC Rcd at 23546.

<sup>&</sup>lt;sup>80</sup> See WWC Wyoming Order, supra, 16 FCC Rcd at 58-59 and n. 70 ("Golden West's Edgemont exchange serves lines in both South Dakota and Wyoming. Range's Alzada and Decker exchanges serve lines in both Montana and Wyoming.... we conclude that we have authority under Section 214(e)(6) to designate such study areas only to the extent that they are contained within the boundaries of the state of Wyoming...We exclude from Western Wireless' service area those portions of the requested study areas that are outside of the state of Wyoming.") See also In the Matter of the Application of N.E. Colorado Cellular, Inc. to Re-define the Service Area of Eastern Slope Rural Telephone Association, Inc., Great Plains Communications, Inc., Plains Coop Tel. Assn., Inc. and Sunflower Tel. Co., Inc., Docket No. 02A-444T (Colo. PUC, Oct. 2, 2003) at pp. 12-14 (redefining as a separate service area the Colorado portion of a rural ILEC exchange overlapping into Nebraska).

commits to cover in their entirety, while Table 2 shows the wire centers that RCC would omit to serve if the Commission determines that only entire wire centers will be designated.

TABLE 1
Covered Wire Centers

TABLE 2
Omitted Wire Centers

Wire Center	ILEC	Wire Center	ILEC
Baltic	Alliance - Baltic	Alcester*	Alliance – Baltic
Crooks	Alliance - Baltic	Brookings	ITC
Hudson	Alliance - Baltic	Chester	ITC
Astoria	ITC	Elkton	ITC
Bradley	ITC	Hendricks	ITC
Brandt	ITC	Nunda	ITC
Bryant	ITC	Sinai	ITC
Castlewood	ITC	Wentworth	ITC
Clark	ITC	White	ITC
Clear Lake	ITC	Claremont	James Valley
Estelline	ITC	Conde	James Valley
Florence	ITC	Groton	James Valley
Gary	ITC	Thurton	James Valley
Goodwin	ITC	Columbia	James Valley
Hayti	ITC	Doland	James Valley
Lake Norden	ITC	Ferney	James Valley
Toronto	ITC	Frederick	James Valley
Waubay	ITC	Haughton	James Valley
Webster	ITC	Hecla	James Valley
Willow Lake	ITC	Mellette	James Valley
Andover	James Valley	Beresford	PrairieWave
Bristol	James Valley	Parker	PrairieWave
Worthing	PrairieWave	Alsen	PrairieWave
Lennox	PrairieWave	Flyger	PrairieWave
Colton	Sioux Valley	Gayville	PrairieWave
Valley Springs	Sioux Valley	Hurley	PrairieWave
Dell Rapids	Sioux Valley	Irene	PrairieWave
Humboldt	Sioux Valley	Wakonda	PrairieWave
Brandon	Alliance - Split Rock	Montrose	Sioux Valley
Garitson	Alliance – Split Rock	Corsica	Sioux Valley
Britton	Sully Buttes-Venture	Plankinton	Sioux Valley
Langford	Sully Buttes-Venture	Trent	Sioux Valley
Pierpoint	Sully Buttes-Venture	Howard	Alliance - Split Rock
Rosholt	Sully Buttes-Venture	Oldham**	Alliance - Split Rock

Exhs. RCC/13 and 14 contain additional rural ILEC wire centers located completely outside of RCC's licensed service area. *See also*, Tr. Vol. 1 at 33 *l*. 3 – 35 *l*. 7; Tr. Vol. 2 at 10 *l*. 24 – 14 *l*. 4.

Roslyn	Sully Buttes-Venture	Blunt	Sully Buttes-Venture
Sisseton	Sully Buttes-Venture	Bowdle	Sully Buttes-Venture
·		East Onida	Sully Buttes-Venture
		Gettysburg	Sully Buttes-Venture
		Harrold	Sully Buttes-Venture
		Highmore	Sully Buttes-Venture
		Hitchcock	Sully Buttes-Venture
		Hoven	Sully Buttes-Venture
		Onaka	Sully Buttes-Venture
		Onida	Sully Buttes-Venture
		Ree Heights	Sully Buttes-Venture
		Roscoe	Sully Buttes-Venture
		Selby	Sully Buttes-Venture
		Seneca	Sully Buttes-Venture
		Tolstoy	Sully Buttes-Venture
		Tulare	Sully Buttes-Venture
		Wessington	Sully Buttes-Venture
		Wessington Springs	Sully Buttes-Venture

<sup>\*</sup> Alliance – Baltic also has a wire center in Iowa, which is not part of this petition. See Exh. Intervenor/11.

In sum, should the Commission decide to only license entire wire centers, then RCC requests that the Commission grant ETC status to RCC in the areas shown on RCC's Exhibit B (as amended by Kohler's and Gruis' testimony), 82 Exhibit C, and in the wire centers listed on Table 1 as set forth above.

# D. THE SDPUC SHOULD ADOPT RCC'S PROPOSED REDEFINITION OF RURAL ILEC SERVICE AREAS

Under the federal statute, a competitive ETC must serve an entire rural ILEC study area in order to be eligible for support, unless the ILEC service area is redefined. Understanding that CMRS carriers and ILECs are not licensed along identical boundaries, the FCC has implemented procedures to redefine ILEC service areas in order to facilitate competitive entry.

<sup>\*\*</sup> Alliance – Split Rock also has a wire center in Minnesota which is not part of this petition. See Exh. Intervenor/11.

<sup>82</sup> Tr. Vol. 1 at 33; Tr. Vol. 2 at 10.

<sup>83 47</sup> U.S.C. § 214(e)(5).

<sup>&</sup>lt;sup>84</sup> See 47 C.F.R. §§ 54.207(b), (c).

The state must determine in the first instance whether to redefine an ILEC service area. Following that determination, the state or the petitioner (in this case, RCC) must seek the FCC's concurrence. Typically, the state grants conditional ETC status for the areas to be redefined, to take effect automatically upon a grant of concurrence by the FCC. As explained below, similar action is warranted in RCC's case and is essential to bring the full public interest benefits of RCC's ETC designation to the state of South Dakota.

### A. Redefinition of Service Areas Is in the Public Interest.

1. RCC cannot effectively compete in the entire territories of all ILECs in RCC's CGSA.

RCC is not licensed to serve the entire service territory of several SDTA member companies, some of which have portions of their study areas scattered throughout South Dakota. RCC's request to have an ETC service area that is coterminous with its licensed service area is similar to proposals that have been adopted by a number of states, including Washington, Minnesota, Maine, Arizona and New Mexico. Unless the affected rural ILEC

<sup>85 47</sup> C.F.R.§ 54.207(c).

<sup>&</sup>lt;sup>86</sup> See, e.g., RCC Oregon Order, supra, at p. 16 (stating that the competitive ETC designation is "conditional on FCC approval of redefinition of the CenturyTel and Sprint service areas. To finalize the application, we will submit a petition for FCC agreement in redefinition of the service areas."); Midwest Minnesota Order, supra, adopting ALJ's Findings of Fact, Conclusions of Law, and Recommendation at ¶14 (ALJ Dec. 31, 2002) (finding that "Midwest Wireless should be designated as an ETC in its proposed service area in Minnesota" and that "[t]he [Minnesota PUC] should petition the FCC for concurrence with Midwest's service area redefinition[.]"; United States Cellular Corporation, 8225-TI-102 at 9 (Wisc. PSC Dec. 20, 2002) ("US Cellular Wisconsin Order") ("[W]here US Cellular is asking for ETC designation in some, but not all, parts of the territory of a rural telephone company, the Commission conditionally grants ETC status in the areas for which US Cellular has requested such designation . . . If the FCC approves use of the smaller area, then US Cellular's ETC status for the smaller area(s) becomes effective."); N.E. Colorado Cellular, Inc., Docket Nos. 00A-315T and 00A-491T at p. 8 (Colo. PUC Dec. 21, 2001) ("NECC Colorado Order") at Exhibit 1 pp. 6-7 (ALJ Dec. 21, 2001) (". . . NECC has satisfied all legal criteria for immediate designation as an ETC and should be granted such status immediately by the Commission, pending . . . any necessary FCC approval of initial [redefinition] of service areas. . ."); SBI Arizona Order, supra, at 16; SBI New Mexico Decision, supra, at 21.

<sup>&</sup>lt;sup>87</sup> Exh. RCC/4 at Exh. D.

<sup>&</sup>lt;sup>88</sup> See, e.g., Petition of the Minnesota Public Utilities Commission for Agreement With Changes in Definition of Service Areas for Exchanges Served by CenturyTel et al., CC Docket No. 96-45 (filed July 8, 2003) (currently pending). See also Smith Bagley, Inc. Petitions for Agreement to

service areas listed in Table 1 and 2 above are redefined, RCC will be unable to receive high-cost support anywhere within the affected rural ILEC service areas. It will be left with a patchwork quilt of areas within its FCC-licensed area that are "ineligible." RCC will not be able to use high-cost support in these areas and low-income consumers will not be able to receive Lifeline and Link-up benefits from RCC. To remove this artificial barrier to competition, RCC requests redefinition of the affected rural ILEC service areas so that each rural ILEC wire center is classified as a separate service area.

## 2. The Requested Redefinition is Consistent with Decisions by the FCC and Other States.

Redefinition so that each rural ILEC wire center is a separate service area is exactly the same relief provided to similarly situated carriers on numerous occasions by the FCC and several state commissions. For example, the FCC granted a petition of the Colorado Public Utilities Commission ("CPUC") for concurrence with a service area redefinition proposal identical to the redefinition proposed by RCC in this proceeding. <sup>89</sup> In redefining CenturyTel's service area such that each wire center is a separate service area, the CPUC emphasized that "in CenturyTel's service area, no company could receive a designation as a competitive ETC unless it is able to provide service in 53 separate, non-contiguous wire centers located across the entirety of Colorado . . . [T]his constitutes a significant barrier to entry." The FCC concurred, and

Redefine the Service Areas of Navajo Communications Company, Citizens Communications Company of the White Mountains, and CenturyTel of the Southwest, Inc. on Tribal Lands within the State of Arizona, DA 01-409 (WCB rel. Feb. 15, 2001) (effective date May 16, 2002); Smith Bagley, Inc. Petitions to Redefine the Service Area of Table Top Telephone Company on Tribal Lands within the State of Arizona, DA 01-814 (WCB rel. April 2, 2001) (effective date July 1, 2001); Smith Bagley, Inc. Petitions to Redefine the Service Area of CenturyTel of the Southwest, Inc. in the State of New Mexico, DA 02-602 (WCB rel. March 13, 2002) (effective date June 13, 2002).

<sup>&</sup>lt;sup>89</sup> See Petition by the Public Utilities Commission of the State of Colorado to Redefine the Service Area of CenturyTel of Eagle, Inc., Pursuant to 47 C.F.R. § 54.207(c) at 5 (filed with the FCC Aug. 1, 2002, effective date Nov. 24, 2002), pet. for recon. pending ("CPUC Petition") ("Petitioner requests agreement to redefine CenturyTel's service area to the wire center level").

<sup>&</sup>lt;sup>90</sup> CPUC Petition at 4.

allowed the requested redefinition to take effect. In the recent *Virginia Cellular* order, the FCC held in favor of redefining the service areas of affected rural ILECs in similar circumstances.<sup>91</sup>

The WUTC's action in redefining all of the rural ILECs in Washington is instructive.

The FCC approved WUTC's petition to redefine the ILECs' service areas along wire center boundaries, finding:

[O]ur concurrence with rural LEC petitioners' request for designation of their individual exchanges as service areas is warranted in order to promote competition. The Washington Commission is particularly concerned that rural areas . . . are not left behind in the move to greater competition. Petitioners also state that designating eligible telecommunications carriers at the exchange level, rather than at the study area level, will promote competitive entry by permitting new entrants to provide service in relatively small areas . . . We conclude that this effort to facilitate local competition justifies our concurrence with the proposed service area redefinition. 92

Other state commissions have similarly concluded that redefining rural ILEC service areas along wire center boundaries is fully justified by the pro-competitive goals of the 1996 Act. For example, in a recommended decision that was later adopted by the Minnesota Public Utilities Commission, the administrative law judge ("ALJ") recommended approval of Midwest Wireless Communications, LLC's proposal to redefine certain rural ILEC service areas—including that of CenturyTel—to consist of wire centers or, in some cases, portions of wire centers. 93

Specifically, the ALJ concluded that "[t]he service area redefinition proposed by Midwest will benefit Minnesota consumers by promoting competitive entry and should be adopted." Similar

<sup>91</sup> Virginia Cellular, supra, 19 FCC Rcd at 1581-82.

<sup>&</sup>lt;sup>92</sup> Petition for Agreement with Designation of Rural Company Eligible Telecommunications Carrier Service Areas and for Approval of the Use of Disaggregation of Study Areas for the Purpose of Distributing Portable Federal Universal Service Support, Memorandum Opinion and Order, 15 FCC Rcd 9924, 9927-28 (1999) ("Washington Redefinition Order").

<sup>&</sup>lt;sup>93</sup> Midwest Minnesota ALJ Decision, *supra*, at ¶¶ 53-59 (Minn. ALJ Dec. 31, 2002); Reply Comments of the Minnesota Public Utilities Commission in CC Docket No. 96-45 at 3 (filed Sept. 9, 2003).

<sup>&</sup>lt;sup>94</sup> Midwest Minnesota ALJ Decision at ¶ 59.

conclusions were reached in decisions granting ETC status to wireless carriers in Arizona, Maine, New Mexico and Wisconsin.<sup>95</sup>

As was the case with the FCC's grant of concurrence with the redefinition of Colorado service areas, the service territories of many SDTA members in South Dakota consist of noncontiguous areas scattered across the length and breadth of the state. <sup>96</sup> It would, therefore, be impractical and unfair and not competitively neutral to require a competitor to conform its service territory—even extend far beyond the reaches of its authorized service area—as a condition to receiving high-cost support. <sup>97</sup>

# B. The Requested Redefinition Satisfies the Three Joint Board Factors Under Section 214(e)(5) of the Act.

The SDPUC must consider three factors in making a determination to redefine an ILEC service area: (1) whether the proposal would result in "cream skimming"; <sup>98</sup> (2) whether the ILEC would incur undue administrative burden; and (3) whether the ILEC's status as a rural carrier would be affected. <sup>99</sup> RCC established that it is not proposing to selectively serve low-cost areas, but is proposing to serve all of its licensed area. In fact, Mr. Wood testified that it is impossible for RCC to intentionally cream skim because the ILEC cost information which would be necessary to develop a strategy to gain uneconomic support levels is proprietary and is not available from any public source. <sup>100</sup>

<sup>&</sup>lt;sup>95</sup> See SBI Arizona Order, supra; RCC Maine Order, supra; SBI N.M. Order, supra; US Cellular Wisconsin Order, supra.

<sup>&</sup>lt;sup>96</sup> See Tr. Vol. 1 at 75 ll. 3-5; Tr. Vol. 1 at 150, ll. 4-13.

<sup>&</sup>lt;sup>97</sup> See First Report and Order, supra, 12 FCC Rcd at 8882 ("We conclude that requiring a carrier to serve a non-contiguous service area as a prerequisite to eligibility might impose a serious barrier to entry, particularly for wireless carriers.").

<sup>&</sup>lt;sup>98</sup> In this context, cream skimming occurs when a competitor selectively enters low-cost portions of a high-cost service area so as to garner uneconomic levels of support. *See Fourteenth Report and Order, supra,* 16 FCC Rcd at 11299; *RCC Alabama Order, supra,* at ¶ 27.

<sup>&</sup>lt;sup>99</sup> See Virginia Cellular, supra; Federal-State Joint Board on Universal Service, Recommended Decision, 12 FCC Rcd 87, 181 (1996) ("Joint Board Recommended Decision").

<sup>&</sup>lt;sup>100</sup> See Exh. RCC/7 at 81 l. 9 - 82 l. 3; Tr. Vol. 2 at 94 l. 14 - 97 l. 2.

Because competitors such as RCC receive the same amount of "per line" high-cost support as an incumbent for each customer, based on the customer's billing address, there is a possibility that competitors could unintentionally receive uneconomic levels of high-cost support. That possibility arises because traditionally incumbents have averaged their support throughout their entire study areas. With the introduction of competition, which is not licensed along ILEC boundaries, it is possible that a competitor's licensed area would cover only the low-cost portions of the ILEC's study area and thus the competitor would receive more support than that area should properly yield.

To minimize the possibility of uneconomic support being paid to competitors, the FCC provided ILECs an opportunity to reallocate support within its study area, going so far as to permit ILECs to designate a different level of support for each wire center, and to create cost zones within wire centers, a process known as disaggregation of support.<sup>101</sup> The deadline for choosing whether to, and how to, disaggregate support was May 15, 2002.<sup>102</sup>

SDTA members understood full well that competitors could file for ETC status well before the deadline for disaggregating support and had every incentive to prevent RCC from receiving uneconomic support in any area. As set forth below, several affected rural ILECs disaggregated support, while others in RCC's proposed ETC service area did not. If any rural

Task Force and commenters that the provision of uniform support throughout the study area of a rural carrier may create uneconomic incentives for competitive entry and could result in support not being used for the purpose for which it was intended, in contravention of section 254(e). Because support is averaged across all lines served by a carrier within its study area under the existing mechanism, the per-line support available throughout the study area is the same even though the costs throughout the study area may vary widely. As a result, artificial barriers to competitive entry in the highest-cost areas and artificial entry incentives in relatively low-cost portions of a rural carrier's study area are created. For example, support would be available to a competitor that serves only the low-cost urban lines, regardless of whether the support exceeds the cost of any of the lines. We conclude therefore that, as a general matter, support should be disaggregated and targeted below the study area level so that support will be distributed in a manner that ensures that the per-line level of support is more closely associated with the cost of providing service.")(footnote omitted).

<sup>&</sup>lt;sup>102</sup> Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, 25 CR 1 (2001) at ¶ 150.

ILEC believes that its plan of disaggregation as filed is not sufficiently precise, or provides RCC with an opportunity to obtain uneconomic levels of support in any area, it may petition the SDPUC to change its plan of disaggregation.<sup>103</sup>

When ILECs disaggregate support, they use actual data about their network costs to target support to the proper areas. <sup>104</sup> In the absence of a disaggregation plan, there is no reliable means of understanding where an ILEC's costs are high or low. Mr. Wood testified that statistics such as population density, or household density provide a very weak correlation to telephone network costs because they do not take into consideration clustering of ILEC facilities. <sup>105</sup>

The FCC used population density to do a cream skimming analysis in *Virginia Cellular* and its progeny. In part because of the problems described by Mr. Wood, the case is on appeal. Nevertheless, the Commission may follow the FCC's discussion of cream skimming in *Virginia Cellular*, and *Highland Cellular*, *supra*. In *Virginia Cellular*, the FCC ruled that even though a CETC was not intentionally attempting to serve the lowest-cost portions of a rural ILEC service area, its proposed ETC service area could still have the effect of cream skimming, because the population density in the wire center proposed to be served was eight times greater than the population density in the wire centers outside of the CETC's licensed area. The affected rural ILEC chose Path 1 (that is, it did not disaggregate its support by the May 1, 2002, deadline) and therefore any entering CETC would receive the same per-line support throughout the ILEC's entire study area. <sup>106</sup>

<sup>&</sup>lt;sup>103</sup> See 47 C.F.R. § 54.315(c)(5).

<sup>&</sup>lt;sup>104</sup> See, e.g., Exh. RCC 17, providing the Path 3 disaggregation plan filed by Sioux Valley, which contains detailed data matching the company's higher cost areas with higher support amounts.

<sup>&</sup>lt;sup>105</sup> See Tr. Vol. 2 at 113 *ll.* 2-5.

<sup>&</sup>lt;sup>106</sup> It is important to note that the density inside was approximately 273 persons per square mile, while the density outside was approximately 33 persons per square mile. Virginia Cellular appealed this portion of the decision because the FCC did not adequately explain why disaggregation of support was not a sufficient option for the affected rural ILEC in that case.

In *Virginia Cellular*, the FCC redefined one affected rural ILEC's service area even though the population density to be served was higher than the area outside the proposed ETC service area. <sup>107</sup>

Aside from the obvious fact that South Dakota has no urban counties having over 100 persons per square mile, and thus little if any cream to skim, an examination of the record evidence using the FCC's analysis establishes conclusively that there are no cream skimming concerns in this case. For each company set forth below, RCC's expert, Don Wood, used the household population density provided by SDTA's expert and in Exh. RCC/14 used that information to replicate the *Virginia Cellular* analysis.

RC Communications, Roberts County Telephone Cooperative, Stockholm-Strandberg, Union Telephone Company, Valley Telephone Company – Minnesota. RCC proposes to serve each of these study areas in their entirety. With respect to Valley, RCC proposes to serve all of the service area located within South Dakota. Accordingly, there are no cream skimming concerns.

Alliance Communications Cooperative — Baltic. RCC proposes to serve three of the four wire centers in this study area that have a combined density of 11.3 households per square mile. RCC will not serve the Alcester wire center, which has a density of 8.1 households per square mile. Although RCC serves the more dense area, the ratio of served to unserved is only 1.4:1.

<sup>&</sup>lt;sup>107</sup> See Virginia Cellular, supra. 19 FCC Rcd at 1579 and n.110 ("The average population density for the MGW wire centers for which Virginia Cellular seeks ETC designation is approximately 2.30 persons per square mile and the average population density for MGW's remaining wire centers is approximately 2.18 persons per square mile. . . Although the average population density of the MGW wire centers which Virginia Cellular proposes to serve is slightly higher than the average population density of MGW's remaining wire centers, the amount of this difference is not significant enough to raise cream skimming concerns. We also note that there is very little disparity between the population densities of the wire centers in the MGW study area.")

<sup>&</sup>lt;sup>108</sup> As shown above, the Commission may designate RCC in that portion of Valley's service area that is within South Dakota. Moreover, the Minnesota Public Utilities Commission has already designated RCC throughout Valley's service area in Minnesota. *See* RCC Minn. Final Order, *supra*. Accordingly, designating RCC in the South Dakota portion will round out RCC's coverage of Valley's service territory.

This disparity is nowhere near the 8:1 ratio present in *Virginia Cellular*. Moreover, RCC will serve no wire center that has a population density greater than 17.8 households per square mile – that is – there is no cream to skim in the Baltic study area.

Alliance Communications Cooperative (Split Rock). RCC proposes to serve the Brandon and Gariston wire centers, which have a combined density of 23.4 households per square mile. RCC will not serve the Howard and Oldham wire centers which have a combined density of 2.6 households per square mile. Even though RCC is proposing to serve the higher density areas, there is no cream skimming concern here because Alliance has disaggregated its support under Path 3, down to two zones per wire center. <sup>109</sup> In Zone 1, which is the lower cost areas within Alliance's service area, the available high-cost support to RCC is only \$2.24 per month. In Zone 2, which is the higher cost areas within Alliance's service area, the available high-cost support to RCC is \$10.93 per month. Thus, RCC is not being unduly rewarded for serving the lower-cost areas, as Alliance has properly targeted most of its high-cost support to areas outside of RCC's proposed entry. This is exactly how the disaggregation system is designed to eliminate cream skimming opportunities for CETCs. <sup>110</sup> As Mr. Wood testified, the information available from the company is far more reliable than population or household density statistics. <sup>111</sup>

<u>Interstate Telecommunications Cooperative</u>. RCC proposes to serve a number of ITC wire centers that have a combined density of 3.5 households per square mile. RCC will not serve

<sup>&</sup>lt;sup>109</sup> See Exh. RCC/16, which contains the Alliance disaggregation plan, as filed with the FCC, describing how it targeted support to higher cost portions of its network and RCC/18 showing cities were separated from rural areas for support calculations.

<sup>&</sup>lt;sup>110</sup> See WWC Wvoming Recon. Order. supra. 16 FCC Rcd at 19149 ("[T]he primary objective in retaining the rural telephone company's study area as the designated service area of a competitive ETC is to ensure that competitors will not be able to target only the customers that are the least expensive to serve and thus undercut the incumbent carrier's ability to provide service to high-cost customers. Rural telephone companies, however, now have the option of disaggregating and targeting high-cost support below the study area level so that support will be distributed in a manner that ensures that the per-line level of support is more closely associated with the cost of providing service. Therefore, any concern regarding 'cream-skimming' of customers that may arise in designating a service area that does not encompass the entire study area of the rural telephone company has been substantially eliminated.")(footnotes omitted).

<sup>&</sup>lt;sup>111</sup> See Tr. Vol. 2 at 95 l. 1 - 97 l. 2.

a number of wire centers that have a combined density of 5.2 households per square mile. Since RCC serves the least dense areas, there is no cream skimming issue here.

James Valley Cooperative Telephone Company. RCC proposes to serve the Andover and Bristol wire centers that have a combined density of 1.7 persons per square mile. RCC will not serve a number of wire centers that have a combined density of 1.7 households per square mile. Since the area to be served is equivalent, there is no cream skimming issue here.

PrairieWave Community Telephone, Inc. RCC proposes to serve two Prairie Wave wire centers that have a combined density of 10.3 households per square mile. RCC will not serve a number of wire centers that have a combined density of 5.1 households per square mile. Although RCC serves the more dense area, the ratio of served to unserved is only 2:1. This disparity is nowhere near the 8:1 ratio present in *Virginia Cellular*. Moreover, RCC will serve no wire center that has a population density greater than 14.8 households per square mile – that is – there is no cream to skim in the PrairieWave study area.

Sioux Valley Telephone Co. RCC proposes to serve four wire centers, which have a combined density of 10.8 households per square mile. RCC will not serve four wire centers which have a combined density of 3.6 households per square mile. Even though RCC is proposing to serve the higher density areas by a slight margin of 3:1, there is no cream skimming concern here because Sioux Valley has disaggregated its support under Path 3, down to two zones per wire center. In Zone 2, which is the lower cost areas within Sioux Valley's service area, the available high-cost support to RCC is only \$5.57 per month. In Zone 1, which is the higher cost areas within Sioux Valley's service area, the available high-cost support to RCC is \$16.42 per month. Thus, RCC is not being unduly rewarded for serving the lower-cost areas, as Sioux Valley has properly targeted most of its high-cost support to areas outside of RCC's proposed ETC service area. One again, this is exactly how the disaggregation system is designed to eliminate cream skimming opportunities for CETCs. It most also be remembered, the two

 $<sup>^{112}</sup>$  See Exh. RCC/17, which provides a detailed disaggregation plan that targets Sioux Valley's support to the highest-cost areas.

lowest density Sioux Valley wire centers are not contiguous with the wire centers served by RCC and no in its licensed area. Rather, those wire center are approximately 70 miles away.

Sully Buttes Telephone Cooperative - Venture. RCC proposes to serve several wire centers, which have a combined density of 3.8 households per square mile. RCC will not serve a number of wire centers which have a combined density of 1.3 households per square mile. Even though RCC is proposing to serve the higher density areas by a ratio of 2.9:1, there is no cream skimming concern here because Sully Buttes has disaggregated its support under Path 3 into two zones. Sully Buttes has designated the Sisseton wire center as Zone 2, and because it has the highest density of households per square mile (7.2) presumably that is the lowest-cost zone. All of the remaining wire centers have been designated as Zone 1, presumably because the others have lower household densities, ranging from 0.2 to 3.5. Also, again, these slightly lower density areas are not contiguous with the wire centers served by RCC.

As a result of Sully Buttes' disaggregation, RCC will not be unduly rewarded for serving the Sisseton wire center, as Sully Buttes has properly targeted most of its high-cost support to its higher-cost areas. Again, this is exactly how the disaggregation system is designed to eliminate cream skimming opportunities for CETCs.

Adopting RCC's proposed service area redefinition will not cause any undue administrative burden on any affected rural ILEC.<sup>114</sup> Nothing in the manner in which ILECs conduct their business will change as a result of their respective service areas being redefined and SDTA introduced no evidence to demonstrate that it will.<sup>115</sup> RCC witness Don Wood aptly summarized the issue as follows:

<sup>113</sup> Sully Butte's disaggregation maps are publicly available on USAC's web site at <a href="http://form498.universalservice.org/hc/disaggregation/default.aspx">http://form498.universalservice.org/hc/disaggregation/default.aspx</a>. The Sully Butte disaggregation maps can be accessed by entering the Study Area Code 391680. The support amounts that Sully Buttes has designated for each zone are not available on USAC's web site. RCC requests the Commission to take official notice of Sully Butte's filing.

<sup>&</sup>lt;sup>114</sup> See Exh. RCC/7 at 76-77.

<sup>&</sup>lt;sup>115</sup> See, e.g., Virginia Cellular, supra, 19 FCC Rcd at 1583.

The ILECs have a service area today. Prior to this quote/unquote redefinition. They have a total service area. They receive a total number of federal support dollars for that service area. If you were to redefine at the wire center level tomorrow, the ILECs would still have the same total service area and would still receive the same total Universal Service dollars. The impact on them in terms of the USF, in terms of the operation of their company and in terms of their network is zero. 116

Finally, nothing about RCC's proposal will affect any rural ILEC's status as a rural telephone company. Service area redefinition does not change how an ILEC is regulated nor does it amount to a change in status under 47 U.S.C. § 251(f) (the rural exemption).

C. In Combination with the Western Wireless ETC Grants, a Grant of RCC's Petition Will Ensure That All Affected Rural ILECs Have At Least One Competitive ETC in All of Their Wire Centers.

A related issue to cream-skimming is the question of whether designation in a portion of a rural ILEC's study area will leave sizable rural areas without competition. In this respect, South Dakota's rural consumers will be well served by a grant of RCC's petition. Between its own service area and Western Wireless', RCC submits that the two companies serve the vast majority of the affected rural ILECs' wire centers in South Dakota. Specifically, when taking both carriers' designated ETC service areas into consideration, the rural LECs affected by RCC's redefinition request will be covered in their entirety by one competitive ETC. Accordingly, consumers in virtually all of the affected rural ILECs' service territory will have the option of requesting service from at least one wireless carrier that has the obligation to take specific steps in response.

Properly understood, *Virginia Cellular* and *Highland Cellular* stand for the proposition that the FCC is concerned with an ILEC having competition throughout its study area. <sup>117</sup> By virtue of granting RCC's petition, the rural ILECs listed above will have just that – and indeed they will have no basis on which to claim that any cream skimming, or effect of cream

<sup>&</sup>lt;sup>116</sup> Tr. Vol. 2 at 92.

<sup>&</sup>lt;sup>117</sup> See Highland Cellular, supra, at 6438 ("Because consumers in rural areas tend to have fewer competitive alternatives than consumers in urban areas, such consumers are more vulnerable to carriers relinquishing ETC designation.")

skimming, problem exists for them. For example, even if it could be shown that RCC can serve only the low-cost portions of a given rural ILEC, any cream skimming concerns would be mooted by Western Wireless's ability to serve all or substantially all of the remaining portions of the study area. If the ILEC has disaggregated support then the cream skimming problem cannot exist. If it has not disaggregated, then at the least it does not have a situation where competition is present in only a portion of its study area.

In short, the redefinition requested in the instant proceeding is in the public interest and it conforms to several others which have been approved by states and the FCC. RCC's proposed redefinition plan will in no way affect the amount or geographic distribution of support received by the rural ILECs, nor will it affect any ILEC's study area boundaries. Most importantly, the requested redefinition will benefit South Dakota consumers in all reaches of RCC's licensed service territory, who will begin to see a variety in pricing packages and service options on par with those available in urban and suburban areas. They will see infrastructure investment in rural areas, which will bring improved wireless service and important health and safety benefits associated with increased levels of radiofrequency coverage. Redefinition will remove a critical obstacle to competition, consistent with federal telecommunications policy.

#### **CONCLUSION**

The question for SDPUC is whether RCC will be able to improve its network in rural South Dakota sooner, later, or in some areas, perhaps never. RCC cannot compete for primary telephone service in high-cost areas with monopoly carriers that receive high-cost support. 120

<sup>&</sup>lt;sup>118</sup> See supra nn. 87, 89.

<sup>&</sup>lt;sup>119</sup> See 47 U.S.C. § 254(b)(3).

<sup>&</sup>lt;sup>120</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 15506-07 (1996) ("Local Competition Order") ("The present universal service system is incompatible with the statutory mandate to introduce efficient competition into local markets, because the current system distorts competition in those markets. For example, without universal service reform, facilities-based entrants would be forced to compete against monopoly providers that enjoy not only the technical, economic, and marketing advantages of incumbency, but also subsidies that are provided only to the incumbents.")

Congress set forth a means to bring competition to rural areas by leveling the playing field in high-cost areas. The FCC has implemented its congressional mandate. RCC's customers pay into the federal fund and they are entitled to the available benefits. Those benefits are not reserved exclusively for ILECs. As FCC Chairman Michael K. Powell recently stated: "Competition is for rural as well as urban customers." <sup>121</sup>

SDPUC's decision to grant RCC's Petition will have a significant and positive effect on competitive telephone service in South Dakota. If SDPUC follows the FCC and virtually every state commission across the country that has addressed wireless ETC designations, RCC will begin to receive federal high-cost support in a manner that is consistent with federal law, enabling it to advance universal service and accelerate network construction in South Dakota. This will bring new, innovative, and better services as well as competitive choice to many rural areas in South Dakota for the first time ever.

RCC respectfully requests the Commission to designate it as an ETC consistent with applicable federal law and precedent.

Respectfully submitted this day of January, 2005.

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<sup>&</sup>lt;sup>121</sup> Separate Statement of Chairman Michael K. Powell in Virginia Cellular, supra.

# BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

In the Matter of the Petition of RCC Minnesota, Inc., and Wireless Alliance, L.L.C., d/b/a Unicel for Designation as an Eligible Telecommunications Carrier Docket No. TC 03-193

#### CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the <u>6</u> day of January, 2005, I served a true and correct copy of RCC Minnesota, Inc., and Wireless Alliance, L.L.C., d/b/a Unicel's Brief by Email and Next Day delivery, prepaid, to:

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### H

#### Briefs and Other Related Documents

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Company; Pennsylvania Telephone Company; Peoples Mutual Telephone Company;

Peoples Telephone Company, Inc.; Pierce Telephone Company, Inc.; Pine Island

Telephone Company; Pinnacle Communications; Prairie Grove Telephone Company;

Pymatuning Independent Telephone Company; Redwood County Telephone Company;

Roanoke Telephone Company, Inc.; Roberts County Telephone Coop Association;

Ronan Telephone Company; Schaller Telephone Company; Searsboro Telephone

Company; Shell Rock Telephone Company; South Canaan Telephone Company;

Southern Montana Telephone Company; State Long Distance Telephone Company; State Telephone Company; Stayton Cooperative

Telephone Company; StockholmStrandburg Telephone Company; Summit Telephone
Company; Swayzee Telephone
Company; Sycamore Telephone Company; Tri
County Telephone Company, Indiana;
Tri-County Telephone Membership Corporation;
Valley Telephone Cooperative,
Inc.: Van Home Cooperative Telephone Company;

Inc.; Van Horne Cooperative Telephone Company; Venus Telephone Corporation; Volcano Telephone Company; West Iowa Telephone

Company; West Liberty
Telephone Company; West Side Telephone
Company; West Side Telephone CompanyPennsylvania; West Tennessee Telephone Company,
Inc.; Western Telephone

Company-South Dakota; Wikstrom Telephone Company, Inc.; Wilton Telephone Company-New Hampshire; Yadkin Valley Telephone Membership Corporation; Yukon-Waltz Telephone Company; and United States Telephone Association, Petitioners,

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents.

No. 98-60213.

Jan. 25, 2000.

(LECs) serving exchange carriers Local predominantly small towns and rural areas petitioned for review of orders of the Federal Communications Commission (FCC) making various changes to universal telecommunications service program. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that: (1) the Telecommunications Act of 1996 is intended to introduce competition into the market and does not guarantee all local telephone service providers a sufficient return on investment; (2) promise of universal service is a goal that requires sufficient funding of customers, not providers; (3) LECs failed to show various changes to the universal service support fund for high-cost loops unreasonably failed to provide sufficient funding for universal service; (4) provision that subsidy for high-cost loops is to be portable does not violate the statutory principle of predictability or the statutory command of sufficient funding; (5) LECs failed to show that changes in the treatment of switching equipment costs, in determining access charges paid by interexchange carriers, unreasonably failed to provide sufficient and explicit funding for universal service; (6) takings clause challenge was premature; (7) orders complied with the Regulatory Flexibility Act (RFA); and (8) the RFA does not require economic analysis.

Petitions denied.

Weiner, Circuit Judge, concurred in the judgment only.

West Headnotes

# [1] Telecommunications 267 372k267 Most Cited Cases

Unlike the express statutory requirement of sufficient support of universal telecommunications service imposed by the Telecommunications Act of 1996, section of the Act stating that "[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public" is merely a broad statement of policy conferring substantial discretion on the Federal Communications Commission (FCC) to determine how best to provide for new technologies and services, and a universal service program that satisfies the specific statutory requirements of sufficient support necessarily satisfies the broad policy statement. Communications Act of 1934, § 7(a), as amended, 47 U.S.C.A. § 157(a); Telecommunications Act of 1996, 47 U.S.C.A. § 254(e).

# [2] Telecommunications 267 372k267 Most Cited Cases

Under the Telecommunications Act of 1996, the Federal Communications Commission (FCC) must see to it that both universal service and local competition are realized; one cannot be sacrificed in favor of the other, and the Commission therefore is responsible for making the changes necessary to its universal service program to ensure that it survives in the new world of competition. Telecommunications Act of 1996, 47 U.S.C.A. § § 251-253, 254(e).

[3] Telecommunications 263 372k263 Most Cited Cases

[3] Telecommunications 267 372k267 Most Cited Cases

Congress has conferred broad discretion on the Federal Communications Commission (FCC) to

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negotiate the dual mandates of the Telecommunications Act of 1996 to promote both universal service and competition, and thus courts ought not lightly interfere with its reasoned attempt to achieve both objectives. 5 U.S.C.A. § 706(2)(A); Telecommunications Act of 1996, 47 U.S.C.A. § § 251-253, 254(e).

# [4] Telecommunications 267 372k267 Most Cited Cases

The Telecommunications Act of 1996 requires that all universal service support be explicit rather than by implicit subsidies, and the universal support program must treat all market participants equally so that, for portable. subsidies must Ъe example, Communications Act of 1934, § 214(e)(1), as 47 U.S.C.A. § 214(e)(1); amended, Telecommunications Act of 1996, 47 U.S.C.A. § 254(e).

# [5] Telecommunications 263 372k263 Most Cited Cases

Where orders of the Federal Communications Commission (FCC) under review, relating to the universal service requirement of the Telecommunications Act of 1996, were merely transitional, in the shift from monopoly to competition, review was especially deferential. Telecommunications Act of 1996, 47 U.S.C.A. § § 251(d)(1), 254(a)(2).

# [6] Statutes 219(2) 361k219(2) Most Cited Cases

# [6] Statutes 219(4) 361k219(4) Most Cited Cases

Court reviews agency interpretation of its statutory authority under the *Chevron* two-step inquiry: (1) where Congress has directly spoken to the precise question at issue, court must give effect to the unambiguously expressed intent of Congress, reversing an agency's interpretation that does not conform to the statute's plain meaning; but (2) in situations in which the statute is either silent or ambiguous, the question for the court is whether the agency's answer is based on a permissible construction of the statute, and court reverses only if the agency's construction is arbitrary, capricious or manifestly contrary to the statute, while if the interpretation is based on a permissible construction

of the statute, court defers to the agency's construction.

# [7] Administrative Law and Procedure 763 15Ak763 Most Cited Cases

### [7] Statutes 219(1) 361k219(1) Most Cited Cases

The *Chevron* step-two analysis focuses on the agency's interpretation of its statutory power, while arbitrary-and-capricious review under the Administrative Procedure Act (APA) focuses on the reasonableness of the agency's decision- making process pursuant to that interpretation. <u>5 U.S.C.A.</u> § 706(2)(A).

# [8] Administrative Law and Procedure 763 15Ak763 Most Cited Cases

Review under the Administrative Procedure Act (APA) to determine whether agency decision is arbitrary and capricious is narrow and deferential, requiring only that the agency articulate a rational relationship between the facts found and the choice made. 5 U.S.C.A. § 706(2)(A).

# [9] Telecommunications 267 372k267 Most Cited Cases

The Telecommunications Act of 1996 is intended to introduce competition into the market and does not guarantee all local telephone service providers a sufficient return on investment. Telecommunications Act of 1996, 47 U.S.C.A. § § 251-253.

# [10] Telecommunications 267 372k267 Most Cited Cases

The promise of universal service under the Telecommunications Act of 1996 is a goal that requires sufficient funding of customers, not providers, and so long as there is sufficient and competitively-neutral funding to enable all customers to receive basic telecommunications services, the Federal Communications Commission (FCC) has satisfied the Act and is not further required to ensure sufficient funding of every local telephone provider as well. Telecommunications Act of 1996, 47 U.S.C.A. § 254.

# [11] Telecommunications 267 372k267 Most Cited Cases

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Excessive funding of universal service support under the Telecommunications Act of 1996 may itself violate the sufficiency requirements of the Act. Telecommunications Act of 1996, 47 U.S.C.A. § 254.

# [12] Telecommunications 267 372k267 Most Cited Cases

telephone exchange carriers serving Local predominantly small towns and rural areas failed to show that the Federal Communications Commission's (FCC's) various changes to the universal service support fund for high-cost loops, including continuation of a cap on growth in the fund and introduction of a cap on the amount of corporate operations expenses that may be reported to determine eligibility for high-cost loop support, unreasonably failed to provide sufficient funding for universal service or otherwise constituted an arbitrary capricious regulation under and **Telecommunications** Act of 1996. Telecommunications Act of 1996, 47 U.S.C.A. § 254.

# [13] Telecommunications 267 372k267 Most Cited Cases

Federal Communications Commission (FCC) order providing that the universal telecommunications service subsidy for high-cost loops is to be portable so that it moves with the customer, rather than staying with the incumbent local exchange carrier (LEC), whenever a customer makes the decision to swifch local service providers does not violate the statutory principle under the Telecommunications Act of 1996 of predictability, or the statutory command of sufficient funding. Communications Act of 1934, § 214(e), as amended, 47 U.S.C.A. § 214(e); Telecommunications Act of 1996, 47 U.S.C.A. § 254(b)(3, 5), (e).

# [14] Telecommunications —4 372k4 Most Cited Cases

Under the Telecommunications Act of 1996, predictability is only a principle, not a statutory command, and thus, to satisfy a countervailing statutory principle, the Federal Communications Commission (FCC) may exercise reasoned discretion to ignore predictability. Telecommunications Act of 1996, 47 U.S.C.A. § 254(b)(5).

# [15] Telecommunications 267 372k267 Most Cited Cases

The sufficiency requirement of the Telecommunications Act of 1996 is intended to benefit the customer, not the provider, and "sufficient" funding of the customer's right to adequate telephone service can be achieved regardless of which carrier ultimately receives the subsidy. Telecommunications Act of 1996, 47 U.S.C.A. § 254(b)(3).

# [16] Telecommunications 267 372k267 Most Cited Cases

Even assuming that inflation adjustments to historical average loop costs would render fewer local exchange eligible carriers (LECs) for telecommunications service subsidies than would be the case under the former approach, LECs failed to show how this interim approach was unreasonable; given eventual transition, under the Telecommunications Act of 1996, from historic cost to forward-looking cost, as required by competition, the Federal Communications Commission (FCC) reasonably concluded that the effort of collecting historic cost data no longer was justified. Telecommunications Act of 1996, 47 U.S.C.A. § 254.

# [17] Telecommunications 267 372k267 Most Cited Cases

Interim order of the Federal Communications Commission (FCC) denying additional universal telecommunications service support in cases in which a rural local exchange carrier (LEC) purchases another exchange was within the discretion of the FCC to combat the opportunity for gaming the different universal service support regimes for rural and non-rural LECs by transferring ownership to a rural LEC. Telecommunications Act of 1996, <u>47</u> U.S.C.A. § 254.

# [18] Administrative Law and Procedure

15Ak390.1 Most Cited Cases

A provision for waiver of an administrative rule is legitimate if the underlying rule is rational, and cannot save a rule that on its own has no rational basis.

# [19] Telecommunications 267 372k267 Most Cited Cases

Local telephone exchange carriers serving predominantly small towns and rural areas failed to show that the Federal Communications Commission's (FCC's) changes in the treatment of switching equipment costs, in determining access charges paid by interexchange carriers, unreasonably failed to provide sufficient and explicit funding for universal service or otherwise constituted an arbitrary and capricious exercise of agency powers under the Telecommunications Act of 1996; the FCC determined that the assumption that it is more costly to switch long-distance calls than local calls, which had initially supported special weighting of the former, was obsolete, and mandate of the Act that all universal service support be "explicit" required that special weighting Ъe eliminated. Telecommunications Act of 1996, 47 U.S.C.A. § 254(e).

# [20] Telecommunications 267 372k267 Most Cited Cases

The fact that universal telecommunications support fund is subsidized by contributions from all providers, telecommunications including exchange carriers (LECs), does not make it an "implicit subsidy" of interexchange carriers in violation of the Telecommunications Act of 1996, even if it effectively redistributes resources among telecommunications providers, and the Federal Communications Commission (FCC) reasonably applied the principle of equitable and requiring nondiscriminatory contribution by contributions from all telecommunications providers. Telecommunications Act of 1996, 47 U.S.C.A. § 254(b)(4), (d, e).

# [21] Telecommunications 267 372k267 Most Cited Cases

Predictability principle of the Telecommunications Act of 1996 requires only predictable rules that govern distribution of universal service subsidies, and not predictable funding amounts, which would run contrary to one of the primary purposes of the Act, to promote competition. Telecommunications Act of 1996, 47 U.S.C.A. § § 251-253, 254(b)(5).

# [22] Eminent Domain 2(1)

148k2(1) Most Cited Cases

# [22] Eminent Domain 277 148k277 Most Cited Cases

The Fifth Amendment takings clause protects utilities from regulations that are so unjust as to be confiscatory, but it is not enough that a party merely speculates that a government action will cause it harm; rather, a taking must necessarily result from the regulatory actions, and such a showing cannot be made until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular property right in question. U.S.C.A. Const.Amend. 5.

# [23] Eminent Domain 2(1.1) 148k2(1.1) Most Cited Cases

telephone Local exchange carriers serving predominantly small towns and rural areas, challenging under the takings clause changes in universal telecommunications support subsidies, had to show that the challenged orders would jeopardize the financial integrity of the companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital, or they had to demonstrate that the reduced subsidies were inadequate to compensate current equity holders for the risk associated with their investments under a modified prudent investment scheme. U.S.C.A. Const.Amend. 5.

# [24] Telecommunications 263 372k263 Most Cited Cases

Court of Appeals could not seriously entertain a takings clause challenge to Federal Communications Commission (FCC) order changing universal telecommunications support subsidies until it was known what level of universal service funding each rural or small town local exchange carrier (LEC) would receive under the order, and under what circumstances the FCC would grant a waiver, particularly where the LECs did not present credible evidence that the order ever will cause drastic consequences for rural LECs; the mere fact that, for many rural carriers, universal service support provides a large share of the carriers' revenues is not enough to establish that the orders constitute a <u>U.S.</u>C.A. Const.Amend. Telecommunications Act of 1996, 47 U.S.C.A. § 254.

# [25] Eminent Domain 2(1.1) 148k2(1.1) Most Cited Cases

The Fifth Amendment protects against takings but does not confer a constitutional right on utilities to government-subsidized profits. <u>U.S.C.A.</u> Const.Amend. 5.

# [26] Administrative Law and Procedure 797 15Ak797 Most Cited Cases

Court of Appeals reviews agency compliance with the Regulatory Flexibility Act (RFA) only to determine whether an agency has made a reasonable, good-faith effort to carry out the mandate of the RFA. 5 U.S.C.A. § 604, 611(a)(1).

# [27] Administrative Law and Procedure 381 15Ak381 Most Cited Cases

The Regulatory Flexibility Act (RFA) is a procedural rather than substantive agency mandate. 5 U.S.C.A. § 604(a).

# [28] Telecommunications 267 372k267 Most Cited Cases

Orders of the Federal Communications Commission (FCC) making various changes in universal telecommunications support under the Telecommunications Act of 1996 complied with the Regulatory Flexibility Act (RFA), where the orders were accompanied by substantial discussion and deliberation, including consideration and reasoned rejection of significant alternatives which, in the Commission's judgment, would not have achieved with equivalent success its twin statutory mandates of universal service and local competition. 5 U.S.C.A. § 604(a); Telecommunications Act of 1996, 47 U.S.C.A. § § 251-254.

# [29] Administrative Law and Procedure

15Ak405.5 Most Cited Cases (Formerly 15Ak404.1)

The Regulatory Flexibility Act (RFA) does not require economic analysis, but mandates only that the agency describe the steps it took "to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes." 5 U.S.C.A. § § 604(a)(5), 607.

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Michael E. Glover, Lawrence W. Katz, Edward Harold Shakin, Bell Atlantic Network Services, Inc., Arlington, VA, for Bell Atlantic, Intervenor.

Petitions for Review of Orders of the Federal Communications Commission.

Before <u>SMITH</u>, <u>WIENER</u> and <u>EMILIO M. GARZA</u>, Circuit Judges.

#### JERRY E. SMITH, Circuit Judge:

This is a consolidated challenge to two orders of the Federal Communications Commission (the "FCC,"

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the "Commission," or the "agency") [FN1] promulgated to satisfy the twin Congressional mandates articulated in the Telecommunications Act of 1996 (the "Act") [FN2] of providing universal telecommunications service in the United States and injecting competition into the market for local Petitioners--local telephone telephone service. service providers who serve predominantly small towns and rural areas--challenge the orders as inconsistent with the statutory requirements of the Act; arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A); violative of the Takings Clause, U.S. CONST. amend. V; and in noncompliance with the Regulatory Flexibility Act, 5 U.S.C. § 604. Having jurisdiction to review the orders pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a), we deny the petitions for review.

FN1. In re: Federal-State Joint Board on Universal Serv.; Report and Order in CC Docket No. 96-45, 12 FCC Rcd. 8776 (1997) ("Order"); Fourth Order on Reconsideration in CC Docket No. 96-45; Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd. 5318 (1997); Errata. 13 FCC Rcd. 2372 (1998) ("Fourth Reconsideration Order").

FN2. Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (to be codified as amended in scattered sections of title 47, United States Code).

#### I. THE STATUTORY MANDATES.

Universal service has been a fundamental goal of federal telecommunications regulation since the passage of the Communications Act of 1934. Indeed, the FCC's very purpose is "to make available, so far as possible, to all the people of the United States ... a rapid, efficient, Nation-wide, and world-wide wire and communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151 (as amended). See also Texas Office of Pub. Util. Counsel v. FCC, 183 F.3d 393, 405-06 & n. 2 (5th Cir.1999) ("TOPUC"), petition for cert. filed (Dec. 23, 1999) (No. 99-1072).

[1] Specifically, the Act requires that universal

service support be "explicit and sufficient," 47 U.S.C. § 254(e), and it articulates several guiding principles to govern universal service--including, for example, that "access ... be provided in all regions of the Nation ... including low-income \*615 consumers and those in rural, insular, and high cost areas," that services and rates be "reasonably comparable" to those offered "in urban areas," that "[a]ll providers of telecommunications services ... make an equitable nondiscriminatory contribution to preservation and advancement of universal service," and that universal service support be "specific" and "predictable," *id.* § 254(b)(2)-(5); Order ¶ 21. While the FCC is required to obey statutory commands. the guiding principles congressional intent to delegate difficult policy choices to the Commission's discretion. See TOPUC, 183 F.3d at 411-12. [FN3]

FN3. The Act additionally states that "[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public." 47 U.S.C. § 157(a). Cf. 47 U.S.C. § 254(b)(2) (providing that universal service programs be guided by principle of providing access to advanced telecommunications and information services in all regions). Petitioners argue that the orders violate § 157(a).

Unlike the express statutory requirement of sufficient support of universal service support imposed by 47 U.S.C. § 254(e), § 157(a) is merely a broad statement of policy conferring substantial discretion on the Commission to determine how best to provide for new technologies and services. To our knowledge, § 157(a) has never been used to invalidate an FCC action. We conclude, therefore, that a universal service program that satisfies the specific statutory requirements of § 254(e) necessarily satisfies the broad policy statement of § 157(a).

[2][3] Alongside the universal service mandate is the directive that local telephone markets be opened to competition. See 47 U.S.C. § § 251-253; AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371, 119 S.Ct. 721, 142 L.Ed.2d 835; TOPUC, 183 F.3d at 406, 412. The FCC must see to it that both universal

service and local competition are realized; one cannot be sacrificed in favor of the other. The Commission therefore is responsible for making the changes necessary to its universal service program to ensure that it survives in the new world of competition. [FN4] Because Congress has conferred broad discretion on the agency to negotiate these dual mandates, courts ought not lightly interfere with its reasoned attempt to achieve both objectives. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); 5 U.S.C. § 706(2)(A).

FN4. See Order ¶¶ 1-4, 20 (stating that it "ensure[s] that this system is sustainable in a competitive marketplace, thus ensuring that universal service is available at rates that are 'just, unreasonable, and affordable' for all Americans").

#### II. THE UNIVERSAL SERVICE ORDERS.

The orders under review make various changes to universal service deemed necessary achieve universal service within a competitive environment. We describe the general principles guiding the Commission's judgment, then detail the provisions specifically at issue in petitioners' various challenges.

#### A. COMMISSION PRINCIPLES.

To analyze the purpose and effect of the FCC's numerous regulatory changes to its universal service program, we find it useful first to articulate three principles the Commission has followed in making the transition from monopolistic to competitive universal service. First, rates must be based not on historical, booked costs, but rather on forward-looking costs. After all, market prices respond to current costs; historical investments, by contrast, are sunk costs and thus ignored.

[I]t is current and anticipated cost, rather than historical cost[,] that is relevant to business decisions to enter markets and price products. The business manager makes a decision to enter a new market by comparing anticipated additional revenues (at a particular price) with anticipated additional costs. If the expected revenues cover all the costs caused by the new product, then a rational business manager has sound business\*616 reasons to enter the new market. The historical costs

associated with the plant already in place are essentially irrelevant to this decision since those costs are "sunk" and unavoidable and are unaffected by the new production decision. This factor may be particularly significant in industries such as telecommunications which depend heavily on technological innovation, and in which a firm's accounting, or sunk, costs may have little relation to current pricing decisions.

MCI Communications Corp. v. American Tel. & Tel. Corp., 708 F.2d 1081, 1116-17 (7th Cir.1983). [FN5]

FN5. See also TOPUC, 183 F.3d at 407 (stating that "the FCC decided to use the 'forward-looking' costs to calculate the relevant costs of a carrier.... To encourage carriers to act efficiently, the agency would base its calculation on the costs an efficient carrier would incur (rather than the costs the incumbent carriers historically have incurred)").

[4] Second, the old regime of implicit subsidies—that is, "the manipulation of rates for some customers to subsidize more affordable rates for others"—must be phased out and replaced with explicit universal service subsidies—government grants that cause no distortion to market prices—because a competitive market can bear only the latter.

#### TOPUC, 183 F.3d at 406.

For obvious reasons, this system of implicit subsidies can work well only under regulated conditions. In a competitive environment, a carrier that tries to subsidize below-cost rates to rural customers with above-cost rates to urban customers is vulnerable to a competitor that offers at-cost rates to urban customers. Because opening local telephone markets to competition is a principal objective of the Act, Congress recognized that the universal service system of implicit subsidies would have to be re-examined.

<u>Id.</u> Indeed, the Act requires that all universal service support be explicit. See 47 U.S.C. § 254(e).

Finally, the program must treat all market participants equally--for example, subsidies must be portable--so that the market, and not local or federal government regulators, determines who shall compete for and deliver services to customers. Again, this principle is made necessary not only by the economic realities of competitive markets but also by statute.

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See 47 U.S.C. § 214(e)(1) (requiring that all "eligible telecommunications carrier[s] ... shall be eligible to receive universal service support").

[5] The FCC additionally defends the orders as reasonable *interim* regulations. The shift from monopoly to competition is indeed dramatic. Congress thus expressly contemplated that the Commission would adopt an incremental approach to retooling universal service for a world of competition. [FN6] Because the provisions under review are merely transitional, our review is especially deferential. [FN7]

FN6. It requires the Commission to adopt rules opening the local services market to competition "within 6 months." 47 U.S.C. § By contrast, the Commission 251(d)(1). need only adopt rules establishing a "specific timetable for implementation" of universal service, and even then, it has "15 months" to do so. 47 U.S.C. § 254(a)(2). See also TOPUC, 183 F.3d at 436 ("By instructing the FCC to establish a 'timetable implementation' by the statutory for deadline, Congress assumed the implementation process would occur over a transition period after the fifteen-month deadline.").

FN7. See TOPUC, 183 F.3d at 437 ("Where the statutory language does not explicitly command otherwise, we defer to the agency's reasonable judgment about what will constitute 'sufficient' support during the transition period from one universal service system to another."); id. at 440 n. 85 (acknowledging that "we extend the FCC greater discretion in deciding what will be 'sufficient' during the transition period"); MCI Telecomm. Corp. v. FCC, 750 F.2d 135, 140 (D.C.Cir.1984) (noting that "substantial deference by courts is accorded to an agency when the issue concerns interim relief").

#### B. PROVISIONS.

Telephone service is jointly provided by two sets of carriers. Local exchange \*617 carriers ("LEC's")

provide local telephone service in a given geographical calling area through monopoly networks, or "exchanges," each comprising a series of "local loops" allowing for interconnection within the exchange. [FN8] Interexchange carriers ("IXC's") provide long distance service by connecting callers served by different LEC's; such service is called "exchange access." [FN9]

FN8. See 47 U.S.C. § 153(26) (defining "local exchange carrier"); 47 U.S.C. § 153(47) (defining "telephone exchange service").

FN9. See 47 U.S.C. § 153(16) (defining "exchange access"); 47 U.S.C. § 153(48) (defining "telephone toll service").

Petitioners are LEC's serving predominantly small towns and rural areas. <u>[FN10]</u> Intervenor Bell Atlantic, supporting the FCC and opposing petitioners, is also an LEC. Intervenor MCI is an IXC and also supports the FCC.

FN10. See 47 U.S.C. § 153(37) (defining "rural telephone company").

The FCC has established a number of universal service programs involving LEC's and IXC's. The Order implements a myriad of amendments to bring those programs into compliance with competition in the LEC market, but petitioners object to amendments to two of them.

First, they oppose various changes to the universal service support fund for high cost loops. Second, before issuing the Order, the FCC allowed certain small, generally rural LEC's to weight specially the amount of time spent by their telephone switching equipment on switching long distance calls, for purposes of calculating the access charges those LEC's may collect from IXC's. The Order would eliminate this effective subsidy and replace it with a new, explicit support fund.

#### 1. HIGH-COST LOOPS.

Rural LEC's face special obstacles. The cost of

providing telephone service varies with population density, because dispersed populations require longer wires and permit lesser economies in installation, service, and maintenance. Also relevant are geographic characteristics, for climate and certain types of terrain make service calls and repairs more costly. Rural areas where telephone customers are dispersed and terrain is unaccommodating are therefore the most expensive to serve.

To meet its historic mandate of universal service, the FCC has established a universal service fund to subsidize high-cost rural LEC's to reduce the rates they must charge their customers. An LEC is eligible for a subsidy if its operating expenses—its "loop costs"—are fifteen percent or more above the national average. Loop costs include the costs of the depreciated cable, wire, and circuit equipment used to provide local service, the depreciation and maintenance expenses associated with that local plant, and the corporate operations expenses related to the provision of local service.

"Corporate operations expenses" include the costs incurred in formulating corporate policy, providing overall administration and management, and hiring accountants, consultants, and lawyers to understand and comply with FCC, state, and local regulations. To determine the amount of corporate operations expense that is properly chargeable to the provision of local service (and therefore included in total loop costs for purposes of determining eligibility for a subsidy), an LEC must reduce its total corporate operations expenses to correspond to the proportion of its entire plant that is local exchange plant.

Petitioners object to a variety of changes the Order effects to the administration of the fund. First, they oppose the continued imposition of a cap on growth in fund expenditures, which cap limits total available support to the previous year's level, adjusted for growth in the number of working loops. See Order ¶ 302. Second, \*618 they object to a new cap on the amount of corporate operations expenses that can be included in the loop cost calculation. The Order allows LEC's to report corporate operations expenses only up to 115% of the industry average for LEC's of like size. See Order ¶ ¶ 283-285, 307.

Third, the Order makes the subsidy portable, following the customer who switches service from one LEC to another. Petitioners claim that portability violates the principle of predictable

funding. See Order ¶ 311. Fourth, beginning January 1, 2000, the Order imposes an annual inflation index on the loop cost eligibility benchmark-the minimum amount a loop must cost to be awarded a subsidy—replacing the former approach of recalculating a fresh benchmark periodically, based on updated estimates of industry averages. See Order ¶ ¶ 300-301; 47 C.F.R. § 36.622(d) (1997). Finally, the Order disallows additional universal service support when a rural LEC acquires and upgrades another exchange, see Order ¶ 308, despite petitioners' claim that such mergers are efficient and should be encouraged.

The cumulative result of all these changes, petitioners say, is that the Commission has rendered LEC's unable to earn a fair return and has discouraged future investment in telecommunications, and thereby has acted arbitrarily and capriciously and has violated the Act's sufficient funding requirement and the Takings Clause.

#### 2. SWITCHING COSTS.

IXC's pay "access charges" to LEC's for the right to have access to an LEC's local exchange to connect long-distance calls to and from that exchange. Jurisdiction to regulate access charges is shared between federal and state governments. To implement rate-of-return regulation, state and federal regulators must allocate the costs of operating an LEC between the delivery of intrastate, interexchange telephone service (which is regulated by state entities) and the provision of interstate service (which is subject to the FCC's jurisdiction). To determine how the allocations are to be made, the agency has promulgated a number of cost separation rules.

The separation rules for costs associated with connecting calls—a process known as "switching"—are based on "dial equipment minutes of use" ("DEM's"). Under the rules, an LEC divides its total DEM's between those used to switch interstate calls and those used to switch intrastate calls.

Before the orders under review, the FCC allowed certain small, generally rural LEC's to weight their DEM totals with a "toll weighting factor," thereby providing LEC's with a higher cost basis on which their federal access charge would be based. Petitioners maintain that the practice of DEM weighting reflects the higher cost of switching a long distance or "toll" call than that of switching a local

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call, because certain network functions required by interexchange carriers--such as equal access, intra-LATA toll dialing parity, toll screening, toll blocking, Signaling System 7(SS7), expanded carrier identification codes, and 800 number portability-require additional central processing hardware and software.

The FCC has long held, however, that the disparity between intrastate and interstate call switching is a relic of old, electromechanical technology and that modern digital switching equipment largely eliminates the cost differential. [FN11] Toll-weighting \*619 continues today, not out of adherence to principles of cost causation—which provide that costs be charged to the source of the cost—but rather to provide an implicit subsidy for rural LEC's. [FN12]

FN11. As the Commission stated in 1987, The Mountain States Telephone Telegraph Company, Northwestern Telephone Company, Pacific Northwest Bell Telephone Company (U.S. West), which originally supported the use of weighted DEM in its comments, changed its position support measured DEM in reply comments because it believes the ongoing process of replacing older technology with digital switches will eliminate the need for any toll weighting. We believe that modern digital switching equipment has greatly reduced, if not eliminated, the additional cost of toll switching.... [W]e believe that the need for toll weighting will continue to diminish and will eventually be eliminated as the exchange carriers continue to replace older technology equipment with digital switches.

In the Matter of Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, Recommended Decision and Order in CC Docket No. 80-286, 2 FCC Rcd. 2551, ¶ 49 (1987). See also In the Matter of MTS and WATS Market Structure, Amendments of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board, Report and Order in CC Docket Nos. 78-72, 80-286, 86-297, 2 FCC Rcd. 2639, ¶ 5 (1987).

FN12. See TOPUC, 183 F.3d at 425 (noting

"the sorts of implicit subsidies currently used by the FCC in its [DEM] weighting program").

The Order replaces toll-weighting with a new universal service fund (separate from the fund for high-cost loops). See Order ¶ ¶ 303-304. Petitioners object for three reasons.

First, they claim the Order arbitrarily and capriciously abandons cost- causation principles. Second, because it would be financed by all telecommunications carriers, including small LEC's such as petitioners, the new fund constitutes an unlawful subsidy by small LEC's in favor of IXC's because it effectively saves IXC's from having to pay for the more expensive cost of switching their longdistance calls. Finally, just as they do with respect to the high-cost loop fund, petitioners object on the ground that portability violates the principle of predictability and the statutory command of sufficient funding. Specifically, they claim that if just 25% of the revenue that the FCC has made portable is lost by a typical small LEC, the annual rate of return for interstate access service will, in many cases, fall to minus 10.53%.

# III. COMMUNICATIONS ACT AND ADMINISTRATIVE PROCEDURE ACT CHALLENGES.

Petitioners' main challenge is that the orders are inconsistent with the statutory mandates of the Act. Therefore, they claim, the orders constitute arbitrary and capricious regulation.

#### A. STANDARD OF REVIEW.

[6] Courts review agency conduct in two ways. First, we review agency interpretation of their statutory authority under the familiar <u>Chevron</u> two-step inquiry. See <u>Chevron</u>, 467 U.S. at 842-44, 104 S.Ct. 2778.

Under step one, where "Congress has directly spoken to the precise question at issue," we must "give effect to the unambiguously expressed intent of Congress," reversing an agency's interpretation that does not conform to the statute's plain meaning. *Id.* at 842-43, 104 S.Ct. 2778. Under step two, which addresses situations in which the statute is either silent or ambiguous, "the question for the court is whether the

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agency's answer is based on a permissible construction of the statute." <u>Id. at 843, 104 S.Ct. 2778</u>. We reverse only if the agency's construction is "arbitrary, capricious or manifestly contrary to the statute." <u>Id. at 844, 104 S.Ct. 2778</u>. If, on the other hand, the interpretation "is based on a permissible construction of the statute," we defer to the agency's construction.

[7][8] In addition, the Administrative Procedure Act ("APA") empowers courts to reverse agency action that is arbitrary and capricious. See 5 U.S.C. § 706(2)(A); Harris v. United States, 19 F.3d 1090 (5th Cir.1994). Chevron step-two focuses on the agency's interpretation of its statutory power, while APA arbitrary-and-capricious review focuses on the reasonableness of the agency's decision-making process pursuant to that interpretation. See TOPUC, 183 F.3d at 410. Like *Chevron* step-two, APA arbitrary and capricious review is \*620 narrow and deferential, requiring only that the agency "articulate[ ] a rational relationship between the facts found and the choice made." Harris, 19 F.3d at 1096 (quoting Motor Vehicle Mfrs. Ass'n of United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). "[T]he agency's decision need not be ideal." Id. Moreover, our review here is especially deferential, because the provisions under review are merely transitional, as expressly contemplated by the Act. [FN13]

FN13. See note 7, supra.

#### B. ANALYSIS.

Petitioners assert two general themes. First, the challenges go directly to the heart of FCC expertise—whether the Commission has sufficiently and explicitly supported universal service in an open, competitive market—and thus must overcome substantial judicial deference. Examining the Act through the lens of <u>Chevron</u>, we note that Congress obviously intended to rely primarily on FCC discretion, and not vigorous judicial review, to ensure satisfaction of the Act's dual mandates. As we noted in a prior challenge to an FCC universal service regulation,

[t]o be sure, the FCC's reason for adopting this methodology is not just to preserve universal service. Rather, it is also trying to encourage local competition.... As long as it can reasonably argue

that the methodology will provide sufficient support for universal service, however, it is free, under the deference we afford it under <u>Chevron</u> step-two, to adopt a methodology that serves its other goal of encouraging local competition.

<u>TOPUC</u>, 183 F.3d at 412. Petitioners do not satisfy the high evidentiary standard necessary to establish that the Commission acted arbitrarily and capriciously when it produced its interim rules.

[9][10] Second, petitioners' sufficiency challenge fundamentally misses the goal of the Act. The Act does not guarantee all local telephone service providers a sufficient return on investment; quite to the contrary, it is intended to introduce competition into the market. Competition necessarily brings the risk that some telephone service providers will be unable to compete. The Act only promises universal service, and that is a goal that requires sufficient funding of customers, not providers. So long as there is sufficient and competitively-neutral funding enable all customers to receive basic telecommunications services, the FCC has satisfied the Act and is not further required to ensure sufficient funding of every local telephone provider as well.

[11] Moreover, excessive funding may itself violate the sufficiency requirements of the Act. Because universal service is funded by a general pool subsidized by all telecommunications providers—and thus indirectly by the customers—excess subsidization in some cases may detract from universal service by causing rates unnecessarily to rise, thereby pricing some consumers out of the market.

#### 1. HIGH-COST LOOPS.

[12] Petitioners fail to show that the FCC's various changes to the universal service support fund for high-cost loops unreasonably fails to provide sufficient funding for universal service or otherwise constitutes an arbitrary and capricious regulation under the Act. First, they object to the agency's continuation of a cap on growth in the fund, adjusted only for changes in the total number of working The cap's track record, however, reflects a reasonable balance between the Commission's mandate to ensure sufficient support for universal service and the need to combat wasteful spending. The agency's broad discretion to provide sufficient universal service funding includes the decision to impose cost controls to avoid excessive expenditures that will detract from \*621 universal service.

Petitioners do not show how the FCC has abused that discretion.

Second, petitioners object to the introduction of a cap on the amount of corporate operations expenses that may be reported to determine eligibility for high-cost loop support. The Order limits LEC's to 115% of the industry average for corporate operations expenses accrued by carriers of like size. See Order ¶ 283-285, 307.

Petitioners claim that corporate operations expenses are already capped and that there is no need for a second cap. [FN14] It is true that, even before the Order, the amount of reportable corporate operations expenses was determined by multiplying an LEC's total corporate operations expenses by the percentage of its total plant that is local exchange plant. This is no cap, however, but rather a reasonable method of allocating costs. The proposed 115% rule is thus a wholly reasonable exercise of the Commission's legitimate power to combat abusive spending; absent the proposed rule, the regulations provide no incentive to keep costs down. Moreover, given its legitimate cost concerns, the agency was well within its discretion to impose a cap rather than to undertake the more costly alternative of intensive auditing.

FN14. See <u>ALLTEL Corp. v. FCC</u>, 838 F.2d 551, 561 (D.C.Cir.1988) ( "A regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.").

Petitioners additionally claim that the cap on review is excessively burdensome, driving interstate rates of return to 2.81% for rural LEC's. Even assuming that this statistic proves that *customers* have failed to receive sufficient universe service support, this statistic is based on the experience of only a single provider--the Bay Springs Telephone Company--and not a statistically valid sample. Petitioners' evidence therefore does not establish that the cap unreasonably fails to provide sufficient service; at most it presents an anomaly that can be addressed by a request for a waiver. [FN15]

<u>FN15.</u> See <u>47 C.F.R.</u> § <u>1.3;</u> Fourth Reconsideration Order ¶ ¶ 93, 102, 108.

Moreover, the statistic ignores the Fourth Reconsideration Order, in which the FCC responded to petitioners' concerns by, *inter alia*, establishing a minimum cap of \$300,000. See Fourth Reconsideration Order ¶ ¶ 85-109. Petitioners present no evidence disputing the sufficiency of the currently operative cap.

[13] Third, the order provides that the universal service subsidy be portable so that it moves with the customer, rather than stay with the incumbent LEC, whenever a customer makes the decision to switch local service providers. Petitioners claim that portability violates the statutory principle of predictability, see 47 U.S.C. § 254(b)(5), and the statutory command of sufficient funding.

[14] We reiterate that predictability is only a principle, not a statutory command. To satisfy a countervailing statutory principle, therefore, the FCC may exercise reasoned discretion to ignore predictability. See <u>TOPUC</u>, 183 F.3d at 411-12.

[15] Moreover, petitioners cannot even show that portability violates sufficiency or predictability. The purpose of universal service is to benefit the customer, not the carrier. [FN16] "Sufficient" funding of the customer's right to adequate telephone service can be achieved regardless of which carrier ultimately receives the subsidy. [FN17]

FN16. See, e.g., 47 U.S.C. § 254(b)(3) (stating that "Consumers in all regions of the Nation" shall receive comparable telephone service).

FN17. Petitioners estimate that the introduction of competition will result in a loss of approximately 25% of the customer base. The FCC counters with historical trends that would predict market share losses of only 3%. Because we conclude that the sufficiency requirement is intended to benefit the customer, not the provider, we need not resolve this particular dispute.

\*622 The methodology governing subsidy disbursements is plainly stated and made available to LEC's. What petitioners seek is not merely

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predictable funding mechanisms, but predictable market outcomes. Indeed, what they wish is protection from competition, the very antithesis of the Act.

To the extent petitioners argue that Congress recognized the precarious competitive positions of rural LEC's, their concerns are addressed by 47 U.S.C. § 214(e), which empowers state commissions to regulate entry into rural markets. [FN18] Furthermore, portability is not only consistent with predictability, but also is dictated by principles of competitive neutrality and the statutory command that universal service support be spent "only for the provision, maintenance, and upgrading of facilities and services for which the [universal service] support is intended." 47 U.S.C. § 254(e).

> FN18. See 47 U.S.C. § 254(e)(2) ("Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.").

[16] Fourth, rather than continue to determine the eligibility threshold for high-cost loop support by recalculating the national average loop cost, the FCC now simply will adjust the previously-calculated national average by an annual inflation index. Even assuming, as petitioners contend, that inflation adjustments to historical averages in fact would render fewer LEC's eligible for universal service subsidies than would be the case under the former approach, petitioners nevertheless fail to show how this interim approach is unreasonable. Given the eventual transition from historic cost to forwardlooking cost, as required by competition, the FCC reasonably concluded that the effort of collecting historic cost data no longer was justified.

[17] Finally, petitioners claim that sales and transfers of exchanges by rural providers are efficient and ought to be encouraged and subsidized. The Order, by contrast, denies additional universal service support in cases in which a rural LEC purchases another exchange.

When the permanent rules for universal access within the context of local competition are in place, all exchanges will be governed by uniform rules with respect to universal service support, without regard to the rural or non-rural status of the LEC. In the interim, however, the rules continue to treat rural and other LEC's differently, in recognition of the continued greater need of rural LEC's. The opportunity thus exists for gaming the different universal service support regimes by transferring ownership to a rural LEC. The FCC acted within its discretion to combat such gaming by keying regulatory treatment to an exchange's original ownership status, without regard to any subsequent transfer in ownership.

[18] The Commission argues that, as a last resort, the availability of waivers cures its orders of any deficiency with respect to sufficiency and predictability. [FN19] Even if the waiver provisions were debatable as a policy matter, they are not an issue for judicial review. For our purposes, a waiver provision is legitimate if the underlying rule is rational, see National Rural Telecom Ass'n v. FCC, 988 F.2d 174, 181 (D.C.Cir.1993), and cannot save a rule that on its own has no rational basis, see ALLTEL Corp., 838 F.2d at 561-62. We therefore can uphold these amendments relating to the high-cost loop fund without addressing the wisdom of allowing waivers.

> FN19. See 47 C.F.R. § 1.3 (general waiver provision for all FCC regulations); Fourth Reconsideration Order ¶ 38 (providing for waiver of indexed cap on growth in high cost loop fund); Id. at ¶ ¶ 93, 102, 108 (providing for waiver of cap on corporate operations expenses).

#### 2. SWITCHING COSTS.

[19] Petitioners also fail to show that the FCC's various changes to the treatment \*623 of switching equipment costs unreasonably fail to provide sufficient and explicit funding for universal service or otherwise constitute an arbitrary and capricious exercise of agency powers under the Act. First, petitioners claim that the changes arbitrarily and capriciously abandon cost- causation principles. They insist on retaining special weighting on the assumption that it is in fact more costly to switch long-distance calls than local calls. Therefore, under cost-causative principles, IXC's should pay higher access charges, because they are responsible for a greater proportion of switching costs.

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As we have said, however, the Commission has long abandoned this assumption. Instead, special weighting has been allowed to continue solely to provide an additional subsidy to rural LEC's, an interest that would be equally served by the new universal service support fund. Indeed, the Order makes plain that the new fund shall provide support "corresponding in amount to that generated formerly by DEM weighting." Order ¶ 303. Moreover, by mandating that all universal service support be "explicit," 47 U.S.C. § 254(e) requires that this special weighting be eliminated.

[20] Petitioners' second objection simply misconstrues the requirement of "explicit" funding. They argue that, because the new fund would be financed by all telecommunications carriers, including small LEC's such as petitioners, the new fund constitutes an unlawful subsidy in favor for IXC's.

Again, petitioners rest their argument on the same assumption deemed obsolete by the FCC--that long-distance switching is more costly than local switching. Even so, we made clear in <u>TOPUC</u> that the implicit/explicit distinction turns on the difference between direct subsidies from support funds and recovery through access charges and rate structures. "The statute provides little guidance on whether 'explicit' means 'explicit to the consumer' ... or 'explicit to the carrier' ... [but it] does state, however, that all universal service support should be 'explicit' ... By forcing GTE to recover its universal service contributions from its access charges, the FCC's interpretation maintains an implicit subsidy for ILEC's such as GTE." <u>183 F.3d at 425.</u>

Petitioners thus misconstrue the meaning of the explicit funding requirement. The fact that the fund is subsidized by contributions from all telecommunications providers, including LEC's, does not make it an implicit subsidy under § 254(e), even if it effectively redistributes resources among telecommunications providers.

Moreover, § 254(b)(4) requires "[a]ll providers of telecommunications services [to] make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service." 47 U.S.C. § 254(b)(4) (emphasis added); see also 47 U.S.C. § 254(d). The Commission reasonably applied the principle of equitable and

nondiscriminatory contribution by requiring contributions from all telecommunications providers.

Finally, petitioners object on the ground that portability violates the principle of predictability and the statutory command of sufficient funding. Specifically, they claim that, if just 25% of the revenue that the FCC has made portable is lost by a typical small LEC, the annual rate of return for interstate access service will, in many cases, fall to minus 10.53%.

[21] As we have said, the Commission reasonably construed the predictability principle to require only predictable *rules* that govern distribution of the subsidies, and not to require predictable *funding amounts*. Indeed, to construe the predictability principle to require the latter would amount to protection from competition and thereby would run contrary to one of the primary purposes of the Act.

Moreover, petitioners' approach to the predictability principle would prohibit also \*624 the current subsidy effect of weighting switching costs. Under the current plan, LEC's receive the subsidy implicitly through access charges—costs that are realized only when customers make telephone calls. The old system of implicit subsidies is no less portable than is the explicit subsidies contemplated by the new fund, for an LEC cannot assess access charges against IXC's for the costs of a customer who has left that LEC for another provider. We therefore uphold the Order over petitioners' APA and Chevron challenges.

#### IV. TAKINGS CHALLENGE.

Notwithstanding the above analysis, petitioners request us to read the Act to avoid a violation of the Takings Clause. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988). We see no reason to invoke the canon of avoidance, however, because we are simply not presented with a constitutional violation.

[22][23] The Fifth Amendment protects utilities from regulations that are "so unjust as to be confiscatory." Duquesne Light Co. v. Barasch, 488 U.S. 299, 307, 109 S.Ct. 609, 102 L.Ed.2d 646 (1989). Petitioners therefore must show that a regulation will "jeopardize the financial integrity of the companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital," or they

must demonstrate that the reduced subsidies "are inadequate to compensate current equity holders for the risk associated with their investments under a modified prudent investment scheme." <u>Duquesne</u>, 488 U.S. at 312, 109 S.Ct. 609.

It is not enough that a party merely speculates that a government action will cause it harm. Rather, a taking must "'necessarily' result from the regulatory actions." TOPUC, 183 F.3d at 437 (citing United States v. Riverside Bayview Homes, 474 U.S. 121, 128 n. 5, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985)). Such a showing cannot be made here "until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular [property right] in question." Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 191, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

[24] At the very least, therefore, petitioners must wait to experience the actual consequences of the Order before a court may even begin to consider whether the FCC has effected a constitutional taking. Until it is known what level of universal service funding each petitioner will receive under the Order, and under what circumstances the Commission will grant a waiver, we cannot seriously entertain a Takings Clause challenge.

[25] Furthermore, petitioners do not present credible evidence that the Order ever will cause the drastic consequences for rural LEC's articulated in <u>Duquesne</u>. The mere fact that, "[f]or many rural carriers, universal service support provides a large share of the carriers' revenues," Order ¶ 294, is not enough to establish that the orders constitute a taking. The Fifth Amendment protects against takings; it does not confer a constitutional right to government-subsidized profits. The Takings Clause thus erects no barrier to our <u>Chevron</u> and APA analysis.

# V. REGULATORY FLEXIBILITY ACT CHALLENGE.

[26] Under the Regulatory Flexibility Act ("RFA"), final agency rules must contain a "final regulatory flexibility analysis" ("FRFA"), 5 U.S.C. § 604(a), which must include

a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the

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factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other \*625 significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

5 U.S.C. § 604(a)(5). In 1996, Congress provided for judicial review of agency compliance with the RFA. See 5 U.S.C. § 611(a)(1). We review only to determine whether an agency has made a "reasonable, good-faith effort" to carry out the mandate of the RFA. Associated Fisheries, Inc. v. Daley, 127 F.3d 104, 114 (1st Cir.1997).

[27][28] Petitioners' RFA argument amounts to little more than a redressing of its earlier <u>Chevron</u> and APA claims. The RFA is a procedural rather than substantive agency mandate, to be sure, [FN20] but petitioners fail to articulate specific procedural flaws in the FCC's promulgation of the orders. In fact, both orders are accompanied by substantial discussion and deliberation, including consideration and reasoned rejection of significant alternatives which, in the Commission's judgment, would not have achieved with equivalent success its twin statutory mandates of universal service and local competition. The RFA requires no more. [FN21]

FN20. See Associated Fisheries, 127 F.3d at 114 (stating that "section 604 does not command an agency to take specific substantive measures, but, rather, only to give explicit consideration to less onerous options").

FN21. See Associated Fisheries, 127 F.3d at 115 (noting that "section 604 does not require that an FRFA address every alternative, but only that it address significant ones.").

[29] Petitioners come closest to stating a meritorious procedural objection when they assert that the FCC failed either to undertake or to present economic analysis. Even assuming that that were so, the RFA plainly does not require economic analysis, but mandates only that the agency describe the steps it took "to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes." 5 U.S.C. § 604(a)(5).

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The RFA specifically requires "a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule." *Id.* Nowhere does it require, however, cost-benefit analysis or economic modeling. Indeed, the RFA expressly states that, "[i]n complying with [section 604], an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable." <u>5 U.S.C. § 607. [FN22]</u> We therefore conclude that the FCC reasonably complied with the requirements of the RFA.

FN22. See also <u>Associated Fisheries</u>, 127 F.3d at 115 ("Section 604 prescribes the content of an FRFA, but it does not demand a particular mode of presentation.").

#### CONCLUSION.

Petitioners' various challenges fail because they fundamentally misunderstand a primary purpose of the Communications Act—to herald and realize a new era of competition in the market for local telephone service while continuing to pursue the goal of universal service. They therefore confuse the requirement of sufficient support for universal service within a market in which telephone service providers compete for customers, which federal law mandates, with a guarantee of economic success for all providers, a guarantee that conflicts with competition.

The FCC interim orders are reasonably tailored to achieving universal service and competition in local markets. They do not effect a cognizable, unconstitutional taking. And they were promulgated in reasonable compliance with the requirements of the RFA. We therefore DENY the petitions for review.

Judge WIENER concurs in the judgment only.

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Briefs and Other Related Documents (Back to top)

• 1998 WL 34079215 (Appellate Brief) Brief for Intervenor MCI Telecommunications Corporation in Support of FCC (Nov. 18, 1998)

- 1998 WL 34084157 (Appellate Brief) Brief for Federal Communications Commission (Nov. 02, 1998)
- 1998 WL 34081624 (Appellate Brief) Brief for Petitioners (Aug. 31, 1998)

END OF DOCUMENT

Released: August 25, 2004

# Before the Federal Communications Commission Washington, D.C. 20554

In the Matter of	)	
Federal-State Joint Board on Universal Service	) CC Docket No. 9	6-45
NPCR, Inc. d/b/a Nextel Partners	, )	
Petition for Designation as an Eligible Telecommunications Carrier in the state of Alabama	)	
Petition for Designation as an Eligible Telecommunications Carrier in the state of Florida	) ) )	
Petition for Designation as an Eligible Telecommunications Carrier in the state of Georgia	)	
Petition for Designation as an Eligible Telecommunications Carrier in the state of New York	)	
Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Pennsylvania	) ) )	
Petition for Designation as an Eligible Telecommunications Carrier in the state of Tennessee	)	
Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia	) ) )	
	ORDER	

Adopted: August 25, 2004

By the Acting Chief, Wireline Competition Bureau:

### I. INTRODUCTION

1. In this Order, we grant the petitions of NPCR, Inc. d/b/a Nextel Partners (Nextel) to be designated as an eligible telecommunications carrier (ETC) for the requested service areas in Alabama, Florida, Georgia, New York, Pennsylvania, Tennessee, and Virginia, pursuant to section 214(e)(6) of the

Communications Act of 1934, as amended (the Act).<sup>1</sup> In so doing, we conclude that Nextel, a commercial mobile radio service (CMRS) carrier, has satisfied the statutory eligibility requirements of section 214(e)(1) to be designated as an ETC.<sup>2</sup>

#### II. BACKGROUND

#### A. The Act

2. Section 254(e) of the Act provides that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support." Pursuant to section 214(e)(1), a common carrier designated as an ETC must offer and advertise the services supported by the federal universal service mechanisms throughout the designated service area.<sup>4</sup>

<sup>&</sup>lt;sup>1</sup>See NPCR, Inc. d/b/a Nextel Partners Petition for Designation as an Eligible Telecommunications Carrier in the State of Alabama, filed Apr. 4, 2003 (AL Petition); Amendment to Petition for Designation as an Eligible Telecommunications Carrier in the State of Alabama, filed July 16, 2003 (AL Amendment); Letter from Catalano & Plache, PLLC, Counsel for Nextel to Marlene H. Dortch, FCC, filed Mar. 24, 2004 (AL March 24 Supplement); NPCR, Inc. d/b/a Nextel Petition for Designation as an Eligible Telecommunications Carrier in the State of Florida, filed Sept. 16, 2003 (FL Petition); Supplement to Petition for Designation as an Eligible Telecommunications Carrier in the State of Florida, filed Sept. 23, 2003 (FL Sept. 23 Supplement); Letter from Catalano & Plache, PLLC, Counsel for Nextel to Marlene H. Dortch, FCC, filed March 24, 2004 (FL March 24 Supplement); NPCR, Inc. d/b/a Nextel Petition for Designation as an Eligible Telecommunications Carrier in the State of Georgia, filed July 10, 2003 (GA Petition); Amendment to Petition for Designation as an Eligible Telecommunications Carrier in the State of Georgia, filed Oct. 28, 2003 (GA Amendment I); Letter from Catalano & Plache, PLLC, Counsel for Nextel to Marlene H. Dortch, FCC, filed March 24, 2004 (GA March 24 Supplement); NPCR, Inc. d/b/a Nextel Partners for Designation as an Eligible Telecommunications Carrier in the State of New York, filed Apr. 3, 2003 (NY Petition); Erratum to Petition for Designation as an Eligible Telecommunications Carrier in the State of New York, filed Apr. 9, 2003 (NY Erratum); Amendment to Petition for Designation as an Eligible Telecommunications Carrier in the State of New York, filed May 28, 2003 (NY Amendment I); Amendment to Petition for Designation as an Eligible Telecommunications Carrier in the State of New York, filed July 16, 2003 (NY Amendment II); Letter from Catalano & Plache, PLLC, Counsel for Nextel to Marlene H. Dortch, FCC, filed March 24, 2004 (NY March 24 Supplement); NPCR, Inc. d/b/a Nextel Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Pennsylvania, filed Apr. 3, 2003 (PA Petition); Letter from Catalano & Plache, PLLC, Counsel for Nextel to Marlene H. Dortch, FCC, filed March 24, 2004 (PA Supplement); NPCR, Inc. d/b/a Nextel Petition for Designation as an Eligible Telecommunications Carrier in the State of Tennessee, filed June 12, 2003 (TN Petition); Erratum to Petition for Designation as an Eligible Telecommunications Carrier in the State of Tennessee, filed July 1, 2003 (TN Erratum I); Amendment to Petition for Designation as an Eligible Telecommunications Carrier in the State of Tennessee, filed July 16, 2003 (TN Amendment); Affidavit of NPCR, Inc. from Donald Manning, NPCR, Inc., filed Oct. 1, 2003 (TN Affidavit I); Affidavit of NPCR, Inc. from Donald Manning, NPCR, Inc., filed Oct. 1, 2003 (TN Affidavit II); Letter from Catalano & Plache, PLLC, Counsel for Nextel to Marlene H. Dortch, FCC, filed March 24, 2004 (TN March 24 Supplement); Erratum to Petition for Designation as an Eligible Telecommunications Carrier in the State of Tennessee, filed Apr. 19, 2004 (TN Erratum II); Second Erratum to Petition for Designation as an Eligible Telecommunications Carrier in the State of Tennessee, filed June 29, 2004 (TN June 29 Erratum); NPCR, Inc. d/b/a Nextel Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, filed Apr. 23, 2003 (VA Petition); Amendment to Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, filed June 10, 2003 (VA Amendment I); Amendment to Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, filed Nov. 24, 2003 (VA November 24 Amendment); Letter from Catalano & Plache, PLLC, Counsel for Nextel to Marlene H. Dortch, FCC, filed March 24, 2004 (VA March 24 Supplement). See also 47 U.S.C. § 214(e)(6).

<sup>&</sup>lt;sup>2</sup>47 U.S.C. § 214(e)(1).

<sup>&</sup>lt;sup>3</sup>47 U.S.C. § 254(e).

<sup>&</sup>lt;sup>4</sup>47 U.S.C. § 214(e)(1).

3. Section 214(e)(2) of the Act provides state commissions with the primary responsibility for performing ETC designations.<sup>5</sup> Section 214(e)(6), however, directs the Commission, upon request, to designate as an ETC "a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission." Under section 214(e)(6), the Commission may, with respect to an area served by a rural telephone company, and shall, in all other cases, designate more than one common carrier as an ETC for a designated service area, consistent with the public interest, convenience, and necessity, so long as the requesting carrier meets the requirements of section 214(e)(1).<sup>7</sup> Before designating an additional ETC for an area served by a rural telephone company, the Commission must determine that the designation is in the public interest.<sup>8</sup> The Wireline Competition Bureau (Bureau) has delegated authority to perform ETC designations.<sup>9</sup>

#### B. Commission Requirements for ETC Designation

- 4. An ETC petition must contain the following: (1) a certification and brief statement of supporting facts demonstrating that the petitioner is not subject to the jurisdiction of a state commission; (2) a certification that the petitioner offers or intends to offer all services designated for support by the Commission pursuant to section 254(c); (3) a certification that the petitioner offers or intends to offer the supported services "either using its own facilities or a combination of its own facilities and resale of another carrier's services;" (4) a description of how the petitioner "advertise[s] the availability of [supported] services and the charges therefor using media of general distribution;" and (5) if the petitioner meets the definition of a "rural telephone company" pursuant to section 3(37) of the Act, the petitioner must identify its study area, or, if the petitioner is not a rural telephone company, it must include a detailed description of the geographic service area for which it requests an ETC designation from the Commission.<sup>10</sup>
- 5. On June 30, 2000, the Commission released the *Twelfth Report and Order* which, among other things, set forth how a carrier seeking ETC designation from the Commission must demonstrate that the state commission lacks jurisdiction to perform the ETC designation.<sup>11</sup> Carriers seeking designation as an ETC for service provided on non-tribal lands must provide the Commission with an "affirmative statement" from the state commission or a court of competent jurisdiction that the carrier is not subject to

<sup>&</sup>lt;sup>5</sup>47 U.S.C. § 214(e)(2). See also Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved Areas, Including Tribal and Insular Areas, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, CC Docket No. 96-45, 15 FCC Rcd 12208, 12255, para. 93 (2000) (Twelfth Report and Order).

<sup>&</sup>lt;sup>6</sup>47 U.S.C. § 214(e)(6). See, e.g., Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia, Memorandum Opinion and Order, CC Docket No. 96-45, 19 FCC Rcd 1563 (2004) (Virginia Cellular Order); Federal-State Joint Board on Universal Service, Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia, Memorandum Opinion and Order, CC Docket No. 96-45, 19 FCC Rcd 6422 (2004) (Highland Cellular Order).

<sup>&</sup>lt;sup>7</sup>47 U.S.C. § 214(e)(6).

<sup>&</sup>lt;sup>8</sup>*Id*.

<sup>&</sup>lt;sup>9</sup>See Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, Public Notice, 12 FCC Rcd 22947, 22948 (1997) (ETC Procedures PN). The Wireline Competition Bureau was previously named the Common Carrier Bureau.

<sup>&</sup>lt;sup>10</sup>See ETC Procedures PN, 12 FCC Rcd at 22948-49; 47 U.S.C. § 3(37). See also Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling, CC Docket No. 96-45, 15 FCC Rcd 15168 (2000) (Declaratory Ruling), recon. pending.

<sup>&</sup>lt;sup>11</sup>See Twelfth Report and Order, 15 FCC Rcd at 12255-65, paras. 93-114.

the state commission's jurisdiction.<sup>12</sup> The requirement to provide an "affirmative statement" ensures that the state commission has had "a specific opportunity to address and resolve issues involving a state commission's authority under state law to regulate certain carriers or classes of carriers."<sup>13</sup>

6. On January 22, 2004, the Commission released the Virginia Cellular Order, which granted in part and denied in part the petition of Virginia Cellular, LLC (Virginia Cellular) to be designated as an ETC throughout its licensed service area in the Commonwealth of Virginia. In that Order, the Commission utilized a new public interest analysis for ETC designations and imposed ongoing conditions and reporting requirements on Virginia Cellular. The Commission further stated that the framework enunciated in the Virginia Cellular Order would apply to all ETC designations for rural areas pending further action by the Commission. Following the framework established in the Virginia Cellular Order, on April 12, 2004, the Commission released the Highland Cellular Order, which granted in part and denied in part the petition of Highland Cellular, Inc., to be designated as an ETC in portions of its licensed service area in the Commonwealth of Virginia. In the Highland Cellular Order, the Commission concluded, among other things, that a telephone company in a rural study area may not be designated as a competitive ETC below the wire center level.

#### C. Nextel Petitions

7. Pursuant to section 214(e)(6), Nextel filed with this Commission seven petitions and amendments thereto, seeking designation as an ETC in study areas served by both rural and non-rural incumbent local exchange carriers (LECs) in the states of Alabama, Florida, Georgia, New York, Pennsylvania, Tennessee, and Virginia. The Bureau released public notices seeking comment on these petitions. Several commenters filed pleadings opposing the petitions. In light of the new ETC

<sup>&</sup>lt;sup>12</sup>Twelfth Report and Order, 15 FCC Rcd at 12255, para. 93.

<sup>&</sup>lt;sup>13</sup>Id.

<sup>&</sup>lt;sup>14</sup>See Virginia Cellular Order, 19 FCC Rcd at 1564, para. 1.

<sup>&</sup>lt;sup>15</sup>See id., 19 FCC Rcd at 1565, 1575, 1575-76, 1584-85, paras. 4, 27, 28, 46.

<sup>&</sup>lt;sup>16</sup>See id., 19 FCC Rcd at 1565, para. 4.

<sup>&</sup>lt;sup>17</sup>See Highland Cellular Order, 19 FCC Rcd at 6422, para. 1.

<sup>&</sup>lt;sup>18</sup>See id., 19 FCC Rcd at 6438, para. 33.

<sup>&</sup>lt;sup>19</sup>See supra note 1. Nextel's initial petitions for ETC designation in the states of Tennessee and Virginia requested redefinition of certain study areas. See TN Petition at 9-10 and VA Petition at 10-11; see also 47 U.S.C § 214(e)(5) and 47 C.F.R. § 54.207(c)(1). Nextel subsequently requested that the Commission disregard its redefinition requests. See TN Erratum and VA Amendment.

<sup>&</sup>lt;sup>20</sup>See Wireline Competition Bureau Seeks Comment on NPCR, Inc. d/b/a Nextel's Petition for Designation as an Eligible Telecommunications Carrier in the State of Alabama, Public Notice, CC Docket No. 96-45, 18 FCC Rcd 14593 (2003); Wireline Competition Bureau Seeks Comment on NPCR, Inc. d/b/a Nextel's Petition for Designation as an Eligible Telecommunications Carrier in the State of Florida, Public Notice, CC Docket No. 96-45, DA 03-4113 (rel. Dec. 30, 2003); Wireline Competition Bureau Seeks Comment on NPCR, Inc. d/b/a Nextel's Petition for Designation as an Eligible Telecommunications Carrier in the State of Georgia, Public Notice, CC Docket No. 96-45, 18 FCC Rcd 16370 (2003); Wireline Competition Bureau Seeks Comment on NPCR, Inc. d/b/a Nextel's Petition for Designation as an Eligible Telecommunications Carrier in the State of New York, Public Notice, CC Docket No. 96-45, 18 FCC Rcd 14590 (2003); Wireline Competition Bureau Seeks Comment on NPCR, Inc. d/b/a Nextel's Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Pennsylvania, Public Notice, CC Docket No. 96-45, 18 FCC Rcd 11530 (2003); Wireline Competition Bureau Seeks Comment on NPCR, Inc. d/b/a Nextel's Petition for Designation as an Eligible Telecommunications Carrier in the State of Tennessee, Public Notice, CC Docket No. 96-45, 18 FCC Rcd 20244 (2003); Wireline Competition Bureau Seeks Comment on NPCR, Inc. d/b/a Nextel's Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, Public Notice, CC Docket No. 96-45, 18 FCC Rcd 20244 (2003); Wireline Competition Bureau Seeks Comment on NPCR, Inc. d/b/a Nextel's Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, Public Notice, CC Docket No. 96-45, 18 FCC Rcd 11792 (2003).

designation framework established in the *Virginia Cellular Order*, on March 9, 2004, Nextel filed supplements to its ETC petitions.<sup>22</sup> On April 2, 2004, the Bureau released a public notice seeking comment concerning all supplemented ETC petitions, including the petitions filed by Nextel.<sup>23</sup>

#### III. DISCUSSION

8. After careful review of the record before us, we find that Nextel has met all the requirements set forth in sections 214(e)(1) and (e)(6) to be designated as an ETC by this Commission for its licensed service areas described herein.

### A. Commission Authority to Perform the ETC Designation

- 9. We find that Nextel has demonstrated that the Commission has authority to consider its seven petitions under section 214(e)(6) of the Act.<sup>24</sup> Nextel's petitions each include an affirmative statement from the relevant state commissions stating that requests for designation as eligible telecommunications carriers should be sought from the Commission.
- 10. We note that the Pennsylvania Public Utility Commission (Pennsylvania Commission) filed reply comments stating that although it submitted a letter stating its intent to refrain from exercising jurisdiction over Nextel for ETC designation purposes, it has not relinquished its jurisdiction altogether for all CMRS carriers. Specifically, the Pennsylvania Commission expresses concern that it did not intend its letter to operate as a pronouncement of its position on jurisdiction for future ETC designations for all wireless carriers. We further note that subsequently, the Pennsylvania Commission filed a letter stating that it does not object to the Commission's consideration of Nextel's petition as long as the effect of its letter is limited solely to Nextel's ETC designation request. We therefore find it is appropriate to consider Nextel's request for ETC designation in Pennsylvania. Moreover, as requested by the Pennsylvania Commission, the effect of the Pennsylvania Commission's letter indicating that it lacks jurisdiction in this proceeding is limited solely to Nextel's ETC petition.

<sup>(...</sup>continued from previous page)

<sup>&</sup>lt;sup>21</sup>See Appendix A for a list of entities filing comments and reply comments associated with the seven petitions for ETC designation.

<sup>&</sup>lt;sup>22</sup>See AL March 24 Supplement; FL March 24 Supplement; GA March 24 Supplement; NY March 24 Supplement; PA March 24 Supplement; VA March 24 Supplement.

<sup>&</sup>lt;sup>23</sup>See Parties are Invited to Comment on Supplemented Petitions for Eligible Telecommunications Carrier Designations, Public Notice, CC Docket No. 96-45, 19 FCC Rcd 6405 (2004).

<sup>&</sup>lt;sup>24</sup>AL Petition at Attachment 2; FL Petition at Attachment 2; GA Petition at Attachment 2; NY Petition at Attachment 2; PA Petition at Attachment 2; TN Petition at Attachment 2.

<sup>&</sup>lt;sup>25</sup>Pennsylvania Commission Reply Comments at 3.

<sup>&</sup>lt;sup>26</sup>Pennsylvania Commission Supplement Comments at 2-3. The Pennsylvania Commission further urges the Commission to delay action on Nextel's ETC petition until the conclusion of two proceedings concerning this matter. See Petition of Cellco Partnership d/b/a Verizon Wireless to Terminate Section 251(f)(1)(B) Rural Exemptions of Bentleyville Communication Corporation, et al., Docket Nos. P-00021995 through P-00022015 (Verizon Wireless seeking termination of rural exemption for 21 rural incumbent ILECs) and In Re: Petition for Declaratory Order of AT&T Wireless Services Inc., Docket No. P-00042087 (AT&T requesting Pennsylvania Commission declaratory order that it does not regulate wireless carriers for purposes of ETC designation).

<sup>&</sup>lt;sup>27</sup>Letter from Elizabeth Lion Januzzi, Pennsylvania Public Utility Commission, to Marlene H. Dortch, FCC, filed June 29, 2004.

#### B. Offering and Advertising the Supported Services

- 11. Offering the Services Designated for Support. Nextel has demonstrated through the required certifications and related filings that it now offers, or will offer upon designation as an ETC, the services supported by the federal universal service mechanism. As noted in its petition, Nextel is authorized to provide cellular radiotelephone service in the 800 MHz band. Nextel certifies that it now provides or will provide throughout its designated service area the services and functionalities enumerated in section 54.101(a) of the Commission's rules. Nextel has also certified that, in compliance with rule section 54.405, it will make available and advertise Lifeline service to qualifying low-income consumers. Purthermore, Nextel has committed to commitments that closely track those set forth in the Virginia Cellular Order and Highland Cellular Order, including: (1) annual reporting of progress towards build-out plans, unfulfilled service requests, and complaints per 1,000 handsets; (2) specific commitments to provide service to requesting customers in the area for which it is designated, including those areas outside existing network coverage; and (3) specific commitments to construct new cell sites in areas outside its network coverage.
- 12. We reject the claims of certain commenters that Nextel does not provide the required services and functionalities supported by the universal service mechanism. First, commenters argue that Nextel fails to offer supported services, such as the Lifeline and Link-Up programs, and suggest that the participation rate in Lifeline/Link-Up will not increase even if Nextel was to offer the associated discounts.<sup>32</sup> We note, however, that Nextel states that it will participate in the Lifeline and Link-Up programs and will otherwise comply with all Commission rules governing universal service programs.<sup>33</sup> Second, notwithstanding commenters' allegations,<sup>34</sup> Nextel makes clear that it does and will continue to implement E911 requirements consistent with Commission rules and orders and local Public Safety Answering Point (PSAP) requests.<sup>35</sup> In addition, other commenters assert that Nextel should be required

<sup>&</sup>lt;sup>28</sup>AL Amendment; FL Petition at 1; NY Amendment II; PA Petition at 1; TN Amendment; VA Petition at 1.

<sup>&</sup>lt;sup>29</sup>AL Petition at 2-4; FL Petition at 2-4; GA Petition at 2-4; NY Petition at 2-4; PA Petition at 2-4; TN Petition at 2-4; VA Petition at 2-4.

AL Petition at 7; FL Petition at 8; GA Petition at 7-8; NY Petition at 7-8; PA Petition at 7; TN Petition at 8; VA Petition at 8. 47 C.F.R. § 54.405. We note that ETCs must comply with state requirements in states that have Lifeline programs. See Lifeline and Link-Up, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 03-109, 19 FCC Rcd 8302, 8320 at para. 29 (2003).

<sup>&</sup>lt;sup>31</sup>Nextel has provided detailed information on how it will use universal service support to construct cell sites throughout the states in which it is designated as an ETC. AL March 24 Supplement at Exhibit 2; FL March 24 Supplement at Exhibit 2; GA March 24 Supplement at Exhibit 2; NY March 24 Supplement at Exhibit 2; PA March 24 Supplement at Exhibit 2; VA March 24 Supplement at Exhibit 2; see also Letter from Catalano & Plache, PLLC, Counsel for NCPR, Inc. d/b/a Nextel, to Marlene H. Dortch, FCC (filed June 2, 2004). Specifically, Nextel provides the location by study area of new cell sites, timeframe for commencement and completion of build-out plans, populations served by new cell sites, and cost of build-out plans. See id. In 2004, Nextel will use universal service support to construct 13 cell sites in Alabama, 12 cell sites in Florida, 13 cell sites in Georgia, 19 cell sites in New York, 10 cell sites in Pennsylvania, 3 cell sites in Tennessee, and 16 cell sites in Virginia. Id. We recognize that these plans may change over time depending on consumer demand, fluctuation in universal service support, and related factors. See, e.g., Virginia Cellular Order, 19 FCC Rcd at 1571, para. 16.

<sup>&</sup>lt;sup>32</sup>See, e.g., NY State Telecom Comments at 8.

<sup>&</sup>lt;sup>33</sup>AL Petition at 7; FL Petition at 8; GA Petition at 7-8; NY Petition at 7-8; PA Petition at 7; TN Petition at 8; VA Petition at 8.

<sup>&</sup>lt;sup>34</sup>See, e.g., FW&A Comments at 9; TDS Supplement Comments at 8.

<sup>&</sup>lt;sup>35</sup>AL Petition at 3, FL Petition at 3-4, GA Petition at 3, NY Petition at 3-4, PA Petition at 3-4, TN Petition at 3, VA Petition at 3-4. A valid PSAP request triggers a wireless carrier's obligation to provide enhanced 911 (E911) service to that PSAP. See City of Richardson, Order, CC Docket No. 94-102, 16 FCC Rcd 18982 (2001). In addition,

to offer unlimited local calling to mirror the services offered by wireline carriers or to limit the number of minutes a customer may use to coincide with the number of minutes allocated to the plan selected so that customers do not incur higher charges.<sup>36</sup> Such requirements are unnecessary because the Commission has not established a minimum local usage requirement and Nextel has pledged compliance with any and all minimum usage requirements required by applicable law.<sup>37</sup> Nextel also states that local usage is included in all of its calling plans.<sup>38</sup> Lastly, some commenters argue that Nextel does not provide equal access to interexchange service.<sup>39</sup> Section 54.101(a)(7) of the Commission's rules states that one of the supported services is access to interexchange services, not equal access to those services.<sup>40</sup> Accordingly, we find sufficient Nextel's showing that it will offer access to interexchange services.

- 13. Offering the Supported Services Using a Carrier's Own Facilities. Nextel has demonstrated that it satisfies the requirement of section 214(e)(1)(A) that it offer the supported services using either its own facilities or a combination of its own facilities and resale of another carrier's services. Nextel states that it intends to provide the supported services using its existing network infrastructure.
- 14. Advertising Supported Services. Nextel has demonstrated that it satisfies the requirement of section 214(e)(1)(B) to advertise the availability of the supported services and the charges therefor using media of general distribution.<sup>43</sup> One commenter, however, contends that Nextel does not identify media to be used to advertise the supported services.<sup>44</sup> We disagree. In its petitions, Nextel states that it currently advertises the availability of its services, and will do so for each of the supported services on a regular basis, in newspapers, magazines, television, and radio in accordance with section 54.201(d)(2) of the Commission's rules.<sup>45</sup> Moreover, Nextel has committed to specific methods to publicize the

<sup>(...</sup>continued from previous page)

Nextel must meet certain company-specific handset deployment benchmarks. See Revision of the Commission's Rules To Ensure Compatibility with Enhanced E911 Emergency Calling Systems, Wireless E911 Phase II Implementation Plan of Nextel Communications, Inc., Order, CC Docket No. 94-102, 16 FCC Rcd 18277 (2001).

<sup>&</sup>lt;sup>36</sup>See, e.g., CenturyTel Supplement Comments at 4; FW&A Comments at 9, 13; NASUCA Comments at 2.

<sup>&</sup>lt;sup>37</sup>See AL Petition at 3; FL Petition at 3; GA Petition at 3; NY Petition at 3; PA Petition at 3; VA Petition at 3.

<sup>&</sup>lt;sup>38</sup>See AL Petition at 3; FL Petition at 3; GA Petition at 3; NY Petition at 3; PA Petition at 3; TN Petition at 3; VA Petition at 3.

<sup>&</sup>lt;sup>39</sup>See. e.g.. NASUCA Comments at 2; NY State Telecom Comments at 9; PA Telephone Assn. Comments at 8.

<sup>&</sup>lt;sup>40</sup>47 C.F.R. §54.101(a)(7). We note that in July 2002, four members of the Joint Board recommended adding equal access to interexchange service as a supported service. See Federal-State Joint Board on Universal Service, Recommended Decision, CC Docket No. 96-45, 17 FCC Rcd 14095, 14124-27, paras. 75-86 (2002). In July 2003, the Commission decided to defer consideration of this issue pending resolution of the Commission's proceeding examining the rules relating to high-cost universal service support in competitive areas. See Federal-State Joint Board on Universal Service, Order and Order on Reconsideration, CC Docket No. 96-45, 18 FCC Rcd 15090, 15104, para. 33 (2003). See also infra para. 21 and n.66.

<sup>&</sup>lt;sup>41</sup>47 C.F.R. § 214(e)(1)(A).

<sup>&</sup>lt;sup>42</sup>See AL Petition at 2; FL Petition at 2; GA Petition at 2; NY Petition at 2; PA Petition at 2; TN Petition at 2; VA Petition at 2.

<sup>&</sup>lt;sup>43</sup>47 C.F.R. § 214(e)(1)(B).

<sup>&</sup>lt;sup>44</sup>TDS Supplement Comments at 8-9.

<sup>&</sup>lt;sup>45</sup>See AL Petition at 5; FL Petition at 5-6; GA Petition at 5; NY Petition at 5; PA Petition at 5; TN Petition at 5; and VA Petition at 5. 47 C.F.R § 54.201(d)(2).

availability of Lifeline and Link-Up services and improved service in unserved or underserved areas.<sup>46</sup>

### C. Public Interest Analysis

- 15. We conclude that it is "consistent with the public interest, convenience, and necessity," as required by section 214(e)(6) of the Act, to designate Nextel as an ETC in the study areas served by certain rural telephone companies and non-rural telephone companies in Alabama, Florida, Georgia, New York, Pennsylvania, Tennessee, and Virginia.<sup>47</sup> In determining whether the public interest is served, the Commission places the burden of proof upon the ETC applicant.<sup>48</sup> Nextel has satisfied the burden of proof in establishing that its universal service offering in this area will provide benefits to rural consumers.
- 16. Non-Rural Study Areas. We conclude, as required by section 214(e)(6) of the Act, that it is "consistent with the public interest, convenience, and necessity" to designate Nextel as an ETC for its requested service area that is served by non-rural telephone companies, as provided in Appendix B.<sup>49</sup> We note that the Bureau previously has found designation of additional ETCs in areas served by non-rural telephone companies to be *per se* in the public interest based upon a demonstration that the requesting carrier complies with the statutory eligibility obligations of section 214(e)(1) of the Act.<sup>50</sup> In the Virginia Cellular Order and the Highland Cellular Order, however, the Commission determined that designation of an additional ETC in a non-rural telephone company's study area based merely upon a showing that the requesting carrier complies with section 214(e)(1) of the Act does not necessarily satisfy the public interest in every instance.<sup>51</sup> Nextel's public interest showing here is sufficient, based on the detailed commitments Nextel has made to ensure that it provides high quality service throughout the proposed rural and non-rural service areas; indeed, given our finding that Nextel has satisfied the more rigorous public interest analysis for the rural study areas, it follows that its commitments satisfy the public interest requirements for non-rural areas.<sup>52</sup>
- 17. <u>Rural Study Areas</u>. We also conclude, as required by section 214(e)(6) of the Act, that it is "consistent with the public interest, convenience, and necessity" to designate Nextel as an ETC for its requested service area that is served by rural telephone companies, as provided in Appendix C.<sup>53</sup> In considering whether designation of Nextel as an ETC in areas served by rural telephone companies will serve the public interest, we have considered whether the benefits of an additional ETC in such study areas outweigh any potential harms. In determining whether designation of a competitive ETC in a rural

<sup>&</sup>lt;sup>46</sup>See AL March 24 Supplement at 6-7; FL March 24 Supplement at 6-7; GA March 24 Supplement at 6-7; NY March 24 Supplement at 6-7; PA March 24 Supplement at 6-7; TN March 24 Supplement at 6-7; VA March 24 Supplement at 6-7.

<sup>&</sup>lt;sup>47</sup>47 U.S.C. § 214(e)(6). See Appendices B and C.

<sup>&</sup>lt;sup>48</sup>See Highland Cellular Order19 FCC Rcd at 6431, para. 20; Virginia Cellular Order, 19 FCC Rcd at 1574-75, para. 26.

<sup>&</sup>lt;sup>49</sup>See 47 U.S.C. § 214(e)(6). See also Appendix B.

<sup>50</sup> See, e.g., Cellco Partnership d/b/a Bell Atlantic Mobile Petition for Designation as an Eligible Telecommunications Carrier, Memorandum Opinion and Order, CC Docket No. 96-45, 16 FCC Rcd 39 (2000).

<sup>&</sup>lt;sup>51</sup>See Virginia Cellular Order, 19 FCC Rcd at 1575, para. 27; Highland Cellular Order, 19 FCC Rcd at 6431-32, para. 21.

<sup>&</sup>lt;sup>52</sup>See Virginia Cellular Order, 19 FCC Rcd at 1572-73, para. 21; Highland Cellular Order, 19 FCC Rcd at 6431-32, para. 21. See also AL March 24 Supplement; FL March 24 Supplement; GA March 24 Supplement; NY March 24 Supplement; PA March 24 Supplement; TN March 24 Supplement; VA March 24 Supplement; see also infra paras. 24-25.

<sup>&</sup>lt;sup>53</sup>See 47 U.S.C.§ 214(e)(6). See also Appendix C.

telephone company's service area is in the public interest, we weigh the benefits of increased competitive choice, the impact of the designation on the universal service fund, the unique advantages and disadvantages of the competitor's service offering, any commitments made regarding quality of telephone service, and the competitive ETC's ability to satisfy its obligation to serve the designated service areas within a reasonable time frame.<sup>54</sup>

- 18. Nextel's universal service offering will provide a variety of benefits to customers. For instance, Nextel has committed to provide customers access to telecommunications and data services where they do not have access to a wireline telephone. In addition, the mobility of Nextel's wireless service will provide benefits such as access to emergency services that can mitigate the unique risks of geographic isolation associated with living in rural communities. Moreover, Nextel states that it offers larger local calling areas than those of the incumbent LECs it competes against, which could result in fewer toll charges for Nextel's customers. Further, Nextel has made service quality commitments comparable to those made by petitioners in the *Virginia Cellular Order* and *Highland Cellular Order*, including compliance with the Cellular Telecommunications Industry Association (CTIA) Consumer Code for Wireless Service.
- 19. We reject the arguments of certain commenters that Nextel does not offer service throughout the study areas where it seeks designation and therefore should not be designated in these areas. Specifically, these commenters allege that service is not offered in many of the zip codes within the study areas where Nextel seeks ETC designation. The Commission has already determined that a telecommunications carrier's inability to demonstrate that it can provide ubiquitous service at the time of its request for designation as an ETC should not preclude its designation as an ETC. Moreover, Nextel has committed to improve its network and reach out to areas that it does not currently serve. Another

<sup>&</sup>lt;sup>54</sup>See, e.g., Highland Cellular Order, 19 FCC Rcd at 6435, para. 28; Virginia Cellular Order, 19 FCC Rcd at 1573, para. 22.

<sup>&</sup>lt;sup>55</sup>See AL March 24 Supplement at 3-4; FL March 24 Supplement at 3-4; GA March 24 Supplement at 3-4; NY March 24 Supplement at 3-4; PA March 24 Supplement at 3-4; TN March 24 Supplement at 3-4; VA March 24 Supplement at 3-4.

<sup>&</sup>lt;sup>56</sup>See Virginia Cellular Order, 19 FCC Rcd at 1576, para. 29. See also Twelfth Report and Order, 15 FCC Rcd at 12212, para. 3.

<sup>&</sup>lt;sup>57</sup>See AL Petition at 7; FL Petition at 7-8; GA Petition at 7; NY Petition at 7; PN Petition at 7; TN Petition at 7; VA Petition at 7.

<sup>&</sup>lt;sup>58</sup>See AL March 24 Supplement at 2 and Exhibit 1; FL March 24 Supplement at 2 and Exhibit 1; GA March 24 Supplement at 2 and Exhibit 1; NY March 24 Supplement at 2 and Exhibit 1; PA March 24 Supplement at 2 and Exhibit 1; TN March 24 Supplement at 2 and Exhibit 1; TN March 24 Supplement at 2 and Exhibit 1. CTIA, Consumer Code for Wireless Service, available at <a href="http://www.wow-com.com/pdf/The Code.pdf">http://www.wow-com.com/pdf/The Code.pdf</a>. Under the CTIA Consumer Code, wireless carriers agree to: (1) disclose rates and terms of service to customers; (2) make available maps showing where service is generally available; (3) provide contract terms to customers and confirm changes in service; (4) allow a trial period for new service; (5) provide specific disclosures in advertising; (6) separately identify carrier charges from taxes on billing statements; (7) provide customers the right to terminate service for changes to contract terms; (8) provide ready access to customer service; (9) promptly respond to consumer inquiries and complaints received from government agencies; and (10) abide by policies for protection of consumer privacy.

<sup>&</sup>lt;sup>59</sup>See, e.g., GA Telephone Assn. Comments at 5; NY State Telecom Supplement Comments at 3, 7-8; TDS Supplement Comments at 7-8; PA Telephone Assn. at 4-8; Commonwealth Telephone at 2-3; NY State Telecom Comments 5-7; FW&A Comments at 10.

<sup>&</sup>lt;sup>60</sup>See, e.g., PA Telephone Assn. at 6; NY State Telecom Comments at 5-6.

<sup>61</sup> See Declaratory Ruling, 15 FCC Rcd at 15175, para. 17.

commenter asserts that Nextel excludes residences from its commitment and intends to serve only business customers. 63 We disagree. Nextel's filing does not distinguish between the types of customers with regard to the commitments to improve its network in the study areas for which it seeks ETC designation.64

- Other commenters argue that the Commission should not designate Nextel as an ETC 20. because such designation will not increase competition. They argue that Nextel is not a new entrant in the various markets and other CMRS operators are currently offering service in the designated service areas. 65 We disagree. Quality service available at just, reasonable, and affordable rates is a fundamental principle of the Commission's universal service policies.<sup>66</sup> Although Nextel and other CMRS operators may already offer service in the subject markets, designating Nextel as an ETC will further the Commission's universal service goals by enabling Nextel to better expand and improve its network to serve a greater population and increase competitive choice for customers within the study areas of its ETC designation.
- The Commission is seeking comment on the Recommended Decision of the Federal Joint-21. Board on Universal Service (Joint Board) concerning the process for designation of ETCs and the Commission's rules regarding high-cost universal service support. 67 Commenters argue that, in light of the impact that ETC designations have on the universal service fund, the Commission should not rule on any pending ETC petitions until the completion of the rulemaking proceeding.<sup>68</sup> We believe that grant of these ETC designations will not dramatically burden the universal service fund. For example, even assuming that Nextel captures each and every customer located in the affected study areas, the overall

<sup>(...</sup>continued from previous page)

62 See AL March 24 Supplement; FL March 24 Supplement; GA March 24 Supplement; NY March 24 Supplement; PA March 24 Supplement; TN March 24 Supplement; VA March 24 Supplement; see also Virginia Cellular Petition at 2, 17 and Virginia Cellular October 3 Supplement at 2, Virginia Cellular November 12 Supplement at 4-5 and Attachment.

<sup>&</sup>lt;sup>63</sup>TDS Supplement Comments at 7.

<sup>&</sup>lt;sup>64</sup>See AL March 24 Supplement 4-9: FL March 24 Supplement 4-9: GA March 24 Supplement 4-9: NY March 24 Supplement 4-9; PA March 24 Supplement 4-9; TN March 24 Supplement 4-9; VA March 24 Supplement 4-9.

<sup>&</sup>lt;sup>65</sup>See, e.g., CenturyTel Comments at 2; CenturyTel Supplement Comments at 3-4; Commonwealth Telephone Comments at 5: Frontier Comments at 5: NY State Telecom at 6.

<sup>66</sup> See Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776, 8839, para. 112 (1997) (First Report and Order) ("We recognize affordable rates are essential to inducing consumers to subscribe to telephone service, and also that increasing the number of people connected to the network increases the value of the telecommunications network."); 47 U.S.C.§ 254(b).

<sup>&</sup>lt;sup>67</sup> Federal-State Joint Board on Universal Service, Notice of Proposed Rulemaking, CC Docket No. 96-45, FCC 04-127 (rel. June 8, 2004) (ETC High-Cost NPRM); Federal-State Joint Board on Universal Service, Recommended Decision, CC Docket No. 96-45, 19 FCC Rcd 4257 (2004) (Joint Board Recommended Decision). Among other things, the Joint Board recommended that the Commission adopt permissive federal guidelines for states to consider when designating ETCs under section 214 of the Act. Joint Board Recommended Decision, 19 FCC Rcd at 4258, рага. 2.

<sup>&</sup>lt;sup>68</sup>See, e.g., NY State Telecom Comments at 11-14; OPASTCO Comments at 2. Verizon filed an opposition to all pending ETC petitions, including Nextel Partners', arguing that, among other things, pending ETC petitions should not be acted upon until completion of the Commission's proceeding concerning the ETC designation process and the related rules regarding high-cost universal service support. See Verizon Supplement Comments at 1-5. If the Commission does not stay the pending petitions, NASUCA asks that the Commission explicitly state that the continuing eligibility of the petitioners for ETC designation is contingent upon any future changes to the rules and the rules would be binding on all existing ETCs and those requesting designation. See NASUCA Comments at 2.

size of the high-cost support mechanisms would not significantly increase.<sup>69</sup> Other commenters suggest that the framework articulated in the *Virginia Cellular Order* should be expanded to require competitive ETCs to demonstrate their need for universal service support, to require a cost-benefit analysis based on the overall impact of the USF, and to contain wireless calling plan requirements.<sup>70</sup> Although these are important issues, we decline to delay ruling on pending ETC petitions and to impose additional requirements at this time. Nevertheless, we continue to be mindful of the impact on the universal service fund due to the rapid growth in the number of competitive ETCs. The outcome of the rulemaking proceeding could potentially impact, among other things, continued ETC designations, the amount of support that Nextel and other competitive ETCs receive in the future, and local calling plan benchmarks.

22. We further disagree with Verizon's argument that we should not designate any additional competitive ETCs because it could have a significant impact on the access charge plan established by the Commission's *CALLS Order*. In the voluntarily negotiated CALLS plan, price cap carriers, *inter alia*, agreed to establish a \$650 million target for interstate access support. Similar to other types of universal service support, interstate access support is portable to competitive ETCs. Consequently, because interstate access support is targeted to \$650 million, when a competitive ETC receives interstate access support, there is a corresponding reduction in support available to incumbent carriers. As the CALLS plan was being considered, portability of support to competitive ETCs and its relation to the \$650 million target was contemplated. Accordingly, the CALLS plan is functioning as contemplated by the agreement. We further note that the CALLS plan was designed for a five-year period, which ends in 2005. As part of its consideration of the appropriate regulatory mechanism to replace the CALLS plan, the Commission can examine whether the interstate access support mechanism remains sufficient.

#### D. Designated Service Areas

23. We designate Nextel as an ETC in the requested service areas in Alabama, Florida, Georgia, Tennessee, and Virginia served by non-rural telephone companies, as listed in Appendix B. In addition, we designate Nextel as an ETC in the requested service areas in Alabama, Florida, Georgia,

<sup>&</sup>lt;sup>69</sup>For example, out of the seven states in which Nextel seeks ETC designation, the incumbent carriers in Alabama receive the most high-cost support. The total amount of high-cost support received by such carriers is approximately 1.88% of the total high-cost support available to all ETCs.

<sup>&</sup>lt;sup>70</sup>See, e.g., CenturyTel Supplement Comments at 3-4; Frontier Comments at 6-9; GA Telephone Assn. Comments at 4-5; FW&A Comments at 9, 11, 14; NASUCA Comments at 2-3; NTELOS Comments at 2; NY State Telecom Comments at 11-14; OPASTCO Comments at 2; PA Telephone Assn. Comments at 8-9; TDS Supplement Comments at 8-10.

<sup>&</sup>lt;sup>71</sup>See Verizon Opposition at 2-3; Access Charge Reform, Sixth Report and Order, CC Docket Nos. 96-262 and 94-1, Report and Order, CC Docket No. 99-249, Eleventh Report and Order, CC Docket No 96-45, 15 FCC Rcd 12962 (2000) (subsequent history omitted) (CALLS Order).

<sup>&</sup>lt;sup>72</sup>See 47 C.F.R. § 54.307(a).

<sup>&</sup>lt;sup>73</sup>See CTIA Supplement Reply Comments at 4-5 (quoting Comments of Coalition for Affordable Local and Long Distance Services (CALLS), CC Docket Nos. 94-1, 96-45, 96-262, 99-249, filed Nov. 12, 1999.

<sup>&</sup>lt;sup>74</sup>See CALLS Order, 15 FCC Rcd at 12977, 13046, paras, 35-36, 201.

<sup>&</sup>lt;sup>75</sup>See id. at 12977, para. 36 ("[A]s the term of the CALLS Proposal nears its end, we envision that the Commission will conduct a proceeding to determine whether and to what degree it can deregulate price cap LECs to reflect the existence of competition. At that time, the Commission can also examine whether the interstate access universal service support mechanism remains sufficient.").

<sup>&</sup>lt;sup>76</sup>The designated "service area" for an ETC in an area served by a rural telephone company must be the rural telephone company's study area unless a different definition of the rural telephone company's service area is established by the Commission and the states as provided under the Act. See 47 U.S.C. § 214(e)(5).

New York, Pennsylvania, Tennessee, and Virginia served by rural telephone companies, as listed in Appendix C.<sup>77</sup> As explained above, Nextel's service area for each rural telephone company encompasses the entire study area of each rural telephone company.<sup>78</sup>

#### E. Regulatory Oversight

- Nextel is obligated under section 254(e) of the Act to use high-cost support "only for the provision, maintenance, and upgrading of facilities and services for which support is intended" and is required under sections 54.313 and 54.314 of the Commission's rules to certify annually that it is in compliance with this requirement. Nextel has certified that, consistent with sections 54.313 and 54.314 of the Commission's rules, all federal high-cost support will be "used only for the provision, maintenance and upgrading of facilities and services for which support is intended pursuant to Section 254(e)" of the Act in the areas for which Nextel is designated as an ETC. In addition, Nextel has certified pursuant to sections 54.809 and 54.904 of the Commission's rules that all interstate access universal service support and all interstate common line support provided will be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Nextel has further requested that the Commission find that Nextel has met the appropriate certification filing deadline in order for it to begin receiving support as of its ETC designation date. Accordingly, we treat Nextel's certifications as timely so that it can begin receiving universal service support as of the date of its ETC designation.
- 25. Separate and in addition to its annual certification filing under rule sections 54.513 and 54.314, Nextel has committed to submit records and documentation on an annual basis detailing: (1) its progress towards meeting its build-out plans; (2) the number of complaints per 1,000 handsets; and (3) information detailing how many requests for service from potential customers were unfulfilled for the past year. We require Nextel to submit these additional data to the Commission and USAC on October

<sup>&</sup>lt;sup>77</sup>See Appendix C.

<sup>&</sup>lt;sup>78</sup>See supra para. 19.

<sup>&</sup>lt;sup>79</sup>47 C.F.R. §§ 54.313, 54.314.

<sup>&</sup>lt;sup>80</sup>See AL Petition at 8-9; FL Petition at 9-10; GA Petition at 9; NY Petition at 8-9; PA Petition at 8-9; TN Petition at 11; VA Petition at 11-12; see also TN Affidavit I and TN Affidavit II.

<sup>&</sup>lt;sup>81</sup>47 C.F.R.§§ 54.809, 54.904; see also AL Petition at 8-9; FL Petition at 9-10; GA Petition at 9; NY Petition at 8-9; PA Petition at 8-9; TN Petition at 11; VA Petition at 11-12.

<sup>&</sup>lt;sup>82</sup>See AL Petition at 8-9; FL Petition at 9-10; GA Petition at 9; NY Petition at 8-9; PA Petition at 8-9; TN June 29 Erratum; VA Petition at 11-12.

<sup>&</sup>lt;sup>83</sup>Sections 54.313 and 54.314 provide that the certification must be filed by October 1 of the preceding calendar year to receive support beginning in the first quarter of a subsequent calendar year. 47 C.F.R. §§ 54.313(d)(3), 54.314(d)(3). If the October I deadline for first quarter support is missed, the certification must be filed by January 1 for support to begin in the second quarter, by April 1 for support to begin in the third quarter, and by July 1 for support to begin in the fourth quarter. See id. In instances where carriers are not subject to the jurisdiction of a state, the Commission allows an ETC to certify directly to the Commission and USAC that federal high-cost support will be used in a manner consistent with section 254(e). See 47 C.F.R. §§ 54.313(b); 54.314(b). Moreover, although we accept Nextel's certifications as timely so that it can receive support as of its ETC designation date, consistent with the Commission's rules, the relevant state commissions are not precluded from filing future certifications on behalf of Nextel stating that universal service support is being used for its intended purposes. See 47 C.F.R. §§ 54.313, 54.314.

<sup>&</sup>lt;sup>84</sup> See AL March 24 Supplement at 3-7; FL March 24 Supplement at 3-7; GA March 24 Supplement at 3-7; NY March 24 Supplement at 3-7; PA March 24 Supplement at 3-7; TN March 24 Supplement at 3-7; VA March 24 Supplement at 3-7. Certain commenters argue that Nextel will not use high-cost support for its intended purpose. See, e.g., CenturyTel Supplement Comments at 5. We find that the above commitments alleviate such concerns.

1 of each year beginning October 1, 2005. 85 We find that reliance on Nextel's commitments is reasonable and consistent with the public interest and the Act and the Fifth Circuit decision in *Texas Office of Public Utility Counsel v. FCC*. 86 We conclude that fulfillment of these additional reporting requirements will further the Commission's goal of ensuring that Nextel satisfies its obligation under section 214(e) of the Act to provide supported services throughout its designated service area. We note that the Commission may institute an inquiry on its own motion to examine any ETC's records and documentation to ensure that the high-cost support it receives is being used "only for the provision, maintenance, and upgrading of facilities and services" in the areas where it is designated as an ETC. 87 Nextel will be required to provide such records and documentation to the Commission and USAC upon request. We further emphasize that if Nextel fails to fulfill the requirements of the statute, the Commission's rules, or the terms of this Order after it begins receiving universal service support, the Commission has authority to revoke its ETC designation. 88 The Commission also may assess forfeitures for violations of Commission rules and orders. 89

#### IV. ANTI-DRUG ABUSE ACT CERTIFICATION

26. Pursuant to section 5301 of the Anti-Drug Abuse Act of 1988, no applicant is eligible for any new, modified, or renewed instrument of authorization from the Commission, including authorizations issued pursuant to section 214 of the Act, unless the applicant certifies that neither it, nor any party to its application, is subject to a denial of federal benefits, including Commission benefits. This certification must also include the names of individuals specified by section 1.2002(b) of the Commission's rules. Nextel has provided a certification consistent with the requirements of the Anti-Drug Abuse Act of 1988. We find that Nextel has satisfied the requirements of the Anti-Drug Abuse Act of 1988, as codified in sections 1.2001-1.2003 of the Commission's rules.

#### V. ORDERING CLAUSES

27. Accordingly, IT IS ORDERED that, pursuant to the authority contained in section

<sup>&</sup>lt;sup>85</sup>Nextel's initial submission concerning consumer complaints per 1,000 handsets and unfulfilled service requests will include data from the date ETC designation is granted through June 30, 2005. Future submissions concerning consumer complaints and unfulfilled service requests will include data from July 1 of the previous calendar year through June 30 of the reporting calendar year.

<sup>&</sup>lt;sup>86</sup>Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393, 417-18 (5<sup>th</sup> Cir. 1999) In TOPUC v. FCC, the Fifth Circuit held that that nothing in section 214(e)(2) of the Act prohibits states from imposing additional eligibility conditions on ETCs as part of their designation process. See id. Consistent with this holding, we find that nothing in section 214(e)(6) prohibits the Commission from imposing additional conditions on ETCs when such designations fall under our jurisdiction.

<sup>&</sup>lt;sup>87</sup>47 U.S.C. §§ 220, 403; 47 C.F.R. §§ 54.313, 54.314.

<sup>&</sup>lt;sup>88</sup>See Declaratory Ruling, 15 FCC Rcd at 15174, para. 15. See also 47 U.S.C. § 254(e).

<sup>&</sup>lt;sup>89</sup>See 47 U.S.C. § 503(b).

<sup>9047</sup> U.S.C. § 1.2002(a); 21 U.S.C. § 862.

<sup>&</sup>lt;sup>91</sup>See ETC Procedures PN, 12 FCC Rcd at 22949. Section 1.2002(b) provides that a "party to the application" shall include: "(1) If the applicant is an individual, that individual; (2) If the applicant is a corporation or unincorporated association, all officers, directors, or persons holding 5% or more of the outstanding stock or shares (voting/and or non-voting) of the petitioner; and (3) If the applicant is a partnership, all non-limited partners and any limited partners holding a 5% or more interest in the partnership." 47 C.F.R. § 1.2002(b).

<sup>&</sup>lt;sup>92</sup>See AL Petition at 8 and Attachment 5; FL Petition at and Attachment 4; GA Petition at 8 and Attachment 4; NY Petition at 8 and Attachment 5; PA Petition at 8 and Attachment 5; TN Petition at 11 and Attachment 4; VA Petition at 11 and Attachment 5.

214(e)(6) of the Communications Act, 47 U.S.C. § 214(e)(6), and the authority delegated in sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, NCPR, Inc. d/b/a Nextel Partners IS DESIGNATED AN ELIGIBLE TELECOMMUNICATIONS CARRIER in Alabama, Florida, Georgia, New York, Pennsylvania, Tennessee, and Virginia to the extent described herein.

28. IT IS FURTHER ORDERED that a copy of this Memorandum Opinion and Order SHALL BE transmitted by the Wireline Competition Bureau to the Alabama Public Service Commission, Florida Public Service Commission, Georgia Public Service Commission, New York Department of Public Service, Pennsylvania Public Utility Commission, Tennessee Regulatory Authority, Virginia State Corporation Commission, and the Universal Service Administrative Company.

FEDERAL COMMUNICATIONS COMMISSION

Jeffrey J. Carlisle

Acting Chief, Wireline Competition Bureau

#### Appendix A

# Parties Filing Comments, Reply Comments, Oppositions, Supplemental Comments

Petition for Designation as an Eligible Telecommunications Carrier in the state of Alabama

#### Comments

CenturyTel, Inc. (CenturyTel)
Organization for the Promotion and Advancement of Small Telecommunications Companies
(OPASTCO)

## Reply Comments

NPCR, Inc. d/b/a/ Nextel Partners (Nextel Partners)

#### Opposition

Verizon Communications, Inc. (Verizon)

#### Supplemental Comments

Verizon

TDS Telecommunications Corp. (TDS)

Petition for Designation as an Eligible Telecommunications Carrier in the state of Florida

#### Comments

**OPASTCO** 

National Association of State Utility Consumer Advocates (NASUCA) Fred Williams & Associates, Inc. (FW&A)

TDS

#### Reply Comments

**Nextel Partners** 

Petition for Designation as an Eligible Telecommunications Carrier in the state of Georgia

## Comments

Frontier Communications (Frontier)
Georgia Telephone Association (GA Telephone)
OPASTCO

#### Reply Comments

**Nextel Partners** 

#### **Opposition**

Verizon

# Supplemental Comments

Frontier

TDS

Verizon

## Petition for Designation as an Eligible Telecommunications Carrier in the state of New York

#### Comments

Frontier

New York State Telecommunications Association, Inc. (NY Telecom) OPASTCO

#### Reply Comments

**Nextel Partners** 

## Opposition

Verizon

## Supplemental Comments

NY Telcom

TDS

Verizon

## Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Pennsylvania

#### Comments

Commonwealth Telephone Company (Commonwealth Telephone) Pennsylvania Telephone Association (PA Telephone)

#### Reply Comments

Nextel Partners

**OPASTCO** 

Pennsylvania Public Utility Commission (Pennsylvania Commission)

## Supplemental Comments .

TDS

Pennsylvania Commission

Verizon

Petition for Designation as an Eligible Telecommunications Carrier in the state of Tennessee

#### Comments

**NASUCA** 

**OPASTCO** 

# Reply Comments

Nextel Partners

# Opposition

Verizon

# Supplemental Comments

Verizon

Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia

# Comments

NTELOS, Inc. (NTELOS)

Virginia Rural Southside Telephone Companies

# Reply Comments

**Nextel Partners** 

**OPASTCO** 

# Supplemental Comments

**NTELOS** 

**TDS** 

Verizon

# Appendix B Non-Rural Wire Centers for Inclusion in Nextel's ETC Service Areas

# ALABAMA VERIZON SACs 250281 and 250293

ABVLALXA	FYTTALXA	RCFRALXA
ACVLALXA	GDBAALXA	RDLVALXA
ANDSALXA	GENVALXA	SCBOALXA
ARITALXA	HDLDALXZ	SLCMALXA
BLBTALXA	HRFRALXA	SMSNALXA
BRNDALXA	IRSEALXA	THRSALXA
CLIOALXA	JMSNALXA	TLLSALXA
CLMAALXA	LNCLALXA	TSVLALXA
DTHNALXA	MLCYALXA	WCBGALXA
ELBAALXA	NTSLALXA	WDLYALXA
ENTRALXA	NWBCALXA	WEDWALXA
FRFNALXA	NWTNALXA	
FRHMALXA	OPPALXA	
FWRVALXA	OZRKALXA	

# ALABAMA BELL SOUTH SAC 255181

ALBSALMA	DDVLALMA	MOBLALBF
ALCYALMT	DORAALMA	MOBLALOS
ALVLALMA	EUFLALMA	MOBLALPR
ANTNALLE	EUTWALMA	MOBLALSA
ANTNALMT	EVRGALMA	MOBLALSE
BLFNALMA	FLRNALMA	MOBLALSF
BOAZALMA	FMTNALMT	MOBLALSH
BRHMALCH	FRHPALMA	MOBLALSK
BRHMALCP	FTDPALMA	MOBLALTH
BRHMALEL	GDSDALHS	MPVLALMA
BRHMALEN	GDSDALMT	MTGMALDA
BRHMALEW	GDSDALRD	MTGMALMB
BRHMALFO	GRDLALNM	MTGMALMT
BRHMALFS	GTVLALNM	MTGMALNO
BRHMALHW	GYVLALNM	MTVRALMA
BRAHMALMT	HLVIALMA	OPLKALMT
BRHMALOM	HNVIALLW	PDMTALMA
BRHMALOX	HNVIALMT	PHCYALFM
BRHMALRC	HNVIALPW	PHCYALMA
BRHMALTA	HNVIALRA	PNSNALMA
BRHMALVA	HNVIALRW	PRVLALMA
BRHMALWE	HNVIALUN	SELMALMT
BRHMALWL	HNVLALNM	SYLCALMT
BRTOALMA	HRBOALOM	THVLALMA
BSMRALBU	HZGRALMA	TLDGALMA
BSMRALHT	JCSNALNM	TROYALMA
BSMRALMA	JCVLALMA	TSCLALDH
BYMNALMA	JSPRALMT	TSCLALMT
CALRALMA	LFYTALRS	TSKGALMA
CHLSALMA	LGRNGAMA	VNCNALMA
CLANALMA	LNDNALMA	WBTNALNM
CLMBALMA	MCINALMA	WRRRALNM
CLMNALMA	MDSNALNM	WTMPALMA
CNTMFLLE	MNTVALNM	YORKALMA
CTRNALNM	MOBLALAP	
DCTRALMT	MOBLALAZ	

# FLORIDA BELL SOUTH SAC 215191

CHPLFLJA	LKCYFLMA	PNSCFLBL	
CNTMFLLE	LYHNFLOH	PNSCFLFP	
FMTNALMT	MLTNFLRA	PNSCFLHC	
GCVLFLMA	MNSNFLMA	PNSCFLPB	
GLBRFLMC	PACEFLPV	PNSCFLWA	
HAVNFLMA	PCBHFLNT	SYHSFLCC	
HLNVFLMA	PNCYFLCA	VERNFLMA	
JAYFLMA	PNCYFLMA	FNFNFLMA	

# GEORGIA BELL SOUTH SAC 225192

ADAIRSVL	DUBLIN	NEWNAN
ALBANY	EASTMAN	NEWTON
ATHENS	EATONTON	PELHAM
ATLANTA	FLOWEYBRCH	PINE MT
ATLANTA NE	FORSYTH	RICHLAND
ATLANTA NW	FORTVALLEY	ROCKMART
ATLANTA SO	FRANKLIN	ROME
AUGUSTA	GAINESVL	ROYSTON
BAINBRIDGE	GRANTVILLE	SANDERSVL
BARNESVL	GREENSBORO	SAVANNAH
BLACKSHEAR	GREENVILE	SENOIA
BOWDON	GRIFFIN	SMITHVILLE
BRUNSWICK	HAMILTON	SOCIALCRCL
BUFORD	HAZLEHURST	SPARKS
CALHOUN	HOGANSVL	SPARTA
CAMILLA	JACKSON	SWAINSBORO
CARROLLTON	JESUP	SYLVESTER
CATERSVL	LAGRANGE	THOMASVL
COCHRAN	LAKE PARK	TIFTON
COLUMBUS	LEESBURG	VALDOSTA
CONCORD	LUMPKIN	VIDALIA
CORDELE	LUTHERSVL	VILLA RICA
COVINGTON	MACON	WARNERRBNS
CUMMING	MADISON	WRENS
CUSSETA	MONTICELLO	WRIGHTSVL

## TENNESSEE BELL SOUTH SAC 295185

BLGPTNMA	KNVLTNWH	NSVLTNDO
CHTGTNBR	KNVLTNYH	NSVLTNHH
CHTGTNDT	LBNNTNMA	NSVLTNIN
CHTGTNHT	LFLTTNMA	NSVLTNMC
CHTGTNNS	LNCYTNMA	NSVLTNMT
CHTGTNRB	LODNTNMA	NSVLTNST
CHTGTNSM	LYLSTNMA	NSVLTNUN
CLEVTNMA	MAVLTNMA	OKGVKYES
CLTNTNMA	MCKNTNMA	OKRGTNMT
CLVLTNMA	MMPHTNBA	PSVWTNMT
CRVLTNMA	MMPHTNCK	PTLDTNMA
DNRGTNMA	MMPHTNCT	RRVLTNMA
FKLNTNCC	MMPHTNEL	SANGTNMT
FKLNTNMA	MMPHTNGT	SHCPTNXA
FRDNTNMA	MMPHTNMA	SMYRTNMA
FYVLTNMA	MMPHTNMT	SNVLTNMA
GRVLTNXZ	MMPHTNOA	SRVLTNMA
HCRDTNXA	MMPHTNSL	SVVLTNMT
HDVLTNMA	MMPHTNWW	SWTWTNMY
HHNWTNMA	MNCHTNMA	TLLHTNMA
JCSNTNMA	MRBOTNMA	UNCYTNMA
JFCYTNMA	MRTWTNMA	WHBLTNMT
JLLCTNMA	MSCTTNMT	WHHSTNMA
KNVLTNBE	NSVLTNAP	WHPITNMA
KNVLTNFC	NSVLTNBW	
KNVLTNMA	NSVLTNCH	

# VIRGINIA VERIZON S VA (Contel) SAC 190233

AMHRVAXA	GLDSVAXA	NKVLVAXA	
APMTVAXA	GRBRVAXA	OCQNVAXA	
BRWRVAXA	GRBRVAXB	PMPLVAXA	
CALLVAXA	GRTSVAXA	QNTCVAXA	
CHNCVAXA	HRBRVAXA	RPHNVAXA	
DLCYVAXA	HYMRVAXA	SMFDVAXA	
DLLSVAXA	KZTWVAXA	STCKVAXA	
DYTNVAXA	LRTNVAXA	STFRVAXZ	
EDOMVAXA	MGVLVAXA	WNDSVAXA	
EKTNVAXA	MNSSVAXA	WYCVVAXA	

# VIRGINIA VERIZON VA, INC. (SAC 195040)

ALSNVAAD	CNCRVACN	LOUSVALU	
ALSNVAAX	CNVIVACT	LRTNVAGU '	
ALSNVABA	CRBGVACB	LSBGVALB	
ALSNVABR	CRVIVACV	LVTNVALN	
ALSNVACN	CRVLVACV	LVVLVALV	
ALSNVAFR	DAVLVADA	LYBGVACH	
ALSNVAMV	DAVLVAFP	LYBGVACV	
ARTNVAAR	DBLNVADU	LYBGVAMH	
ARTNVACK	DCVLVADV	LYBGVANL	
ARTNVACY	FIFEVAFI	LYBGVAOF	
ARTNVAFC	FLCHVAMF	LYBGVATM	
ASBNVAAS	FRBGVAFB	LYBGVAYB	
ASKDVAAS	FRBGVALH	MCLNVAVL	
BCHNVABH	FRFXVABF	MDBGVAMI	
BDRFRVABD	FRFXAFF	MNKNVAMN	
BELVLVABV	GNBOVAGA	MNRLVAML	
BGISVABI	GNWDVAGW	MRSHVAMA	
BLMTVABM	GOVLVAGV	NLFRVANF	
BOYCVABY	GVTNVAGR	NRFLVABL	
BTHIVABT	HLBOVAHB	NRFLVABS	
CCVLVACH	HMPNVAAB .	NRFLVAGS	
CGVLVACL	HMPNVADC	NRFLVASP	
CHESVACR	HMPNVAQN	NRFLVAWC	
CHHMVACH	HPWLVAHW	NRTNVANO	
CHSKVACD	HRNDVADU	NRWSVANA	
CHSKFAGU	HRNDVAHE	NWNWVAHV	
CLPPVACU	HRNDVAST	NWNWVAJF	
CLPPVAGR	JNVLVAJV	NWNWVAYK	
CLVRVACL	LBNNVALB	ORNGVAOR	
CMLDVACU	LBNNVARD	PCVLVAPV	

# VIRGINIA VERIZON VA, INC. (SAC 195040)

# continued

RNGLVARG	STTNVAST
RONKVABK	STTNVAVE
RONKVABS	SWVLVASV
RONKVACS	THPLVATP
RONKVACV	UNVLVAUV
RONKVAGC	UPVLVAUP
RONKVALK	VINNVAVN
RSTNVAFM	VRBHVACC
RSTNVALF	VRBHVAGN
SALMVAFL	VRBHVAIL
SALMVAMC	VRBHVAIR
SALMVASA	VRBHVAPT
SFFLVASK	VRBHVARC
SHVLVASW	VRBHVAVB
SNMTVASM	WISEVAWI
SNTNVASS	WLBGVAWM
SPFDVASP	WNCHVANM
SPTSVASP	WNCHVAWC
SRVLVASP	WNTRVAWG
STCYVASC	WRTNVAWR
STRDVASD	WTFRVAWT
	RONKVABK RONKVABS RONKVACS RONKVACV RONKVAGC RONKVALK RSTNVAFM RSTNVALF SALMVAFL SALMVAMC SALMVASA SFFLVASK SHVLVASW SNMTVASM SNTNVASS SPFDVASP SRVLVASP STCYVASC

## Appendix C

## Rural Telephone Study Areas for Inclusion in Nextel's ETC Service Area

#### **ALABAMA**

Butler Telephone Co., Inc. (now TDS)

Castleberry Telephone Co., Inc.

Frontier Communications of Alabama

Frontier Communications of the South

Graceba Total Communications, GTC Inc. — AL, Gulf Telephone Company

Hayneville Telephone Co., Inc.

Millry Telephone Company

Mon-Cre Telephone Cooperative

Pine Belt Telephone Company

Union Springs Telephone Co., Inc.

#### FLORIDA

GTC, Inc. – FL Frontier Communications – South AllTel Florida, Inc. Quincey Telephone Co.

#### **GEORGIA**

Quincy Tel Co-GA Div
Bulloch County Rural
Citizens Tel Co.-GA
Glenwood Tel Co
Comsouth Telecomm
Interstate Tel. Co.
Pembroke Tel Co
Pineland Tel Coop
Planters Rural Coop
Plant Tel Co
Progressive Rural
Public Service Tel
Frontier of GA
Waverly Hall LLC
Accucom Telecom

#### **NEW YORK**

Armstrong Tel Co-NY
Frontier-Ausable Val
Berkshire Tel Corp
Cassadage Tel Corp
Champlain Tel Co
Chautauqua & Erie
Chazy & Westport
Citizens Hammond NY
Taconic Tel Corp
Crown Point Tel
Corp
Delhi Tel Co

#### (New York - continued)

Deposit Tel Co

Dunkirk & Fredonia

Edwards Tel Co

Germantown Tel Co

Hancock Tel Co

Margaretville Tel Co

Middleburgh Tel Co

Alltel NY-Fulton

Newport Tel Co

Ogden Tel Co

Oneida County Rural

Ontario Tel Co, Inc.

AllTel NY-Red Jacket

Oriskany Falls Tel

Pattersonville Tel

Port Byron Tel Co

Frontier - Rochester

Frontier - Seneca Gorh

State Tel Co

Frontier - Sylvan Lake

Township Tel Co

Trumansburg Tel Co

Vernon Tel Co

Warwick Valley-NY

Citizens Telecom-NY

Citizens-Red Hook

Citizens-West. Cnty

Verizon New York

## PENNSYLVANIA

Bentleyville Communications Company

Frontier Communications of Breezewood

Buffalo Valley Telephone Company

Frontier Communications of Canton

Commonwealth Telephone Company

Conestoga Telephone & Telegraph Company

Denver and Ephrata Telephone & Telegraph Company

Ironton Telephone Company

Lackawaxen Telecommunications Services, Inc.

Laurel Highland Telephone Company

Mahanoy and Mahantongo Telephone Company

Marianna-Scenery Telephone Company

North Eastern PN Telephone Company

North Penn Telephone Company

Armstrong Telephone Company - North

Palmerton Telephone Company

Pennsylvania Telephone Company

Pymatuning Independent Telephone Company

South Canaan Telephone Company

Sugar Valley Telephone Company

Venus Telephone Company

West Side Telecommunications

# TENNESSEE

United Inter-MT-TN

## **VIRGINIA**

Amelia Tel Corp Citizens Tel Coop Ntelos, Inc. North River Tel Coop Pembroke Tel Coop Peoples Mutual Tel Roanoke & Botetourt Shenandoah Tel Co Virginia Tel Co Verizon South VA New Castle Tel Co.

# Before the **Federal Communications Commission** Washington, D.C. 20554

In the matter of	)	
	)	
Federal-State Joint Board on	. )	
Universal Service	) .	CC Docket No. 96-45
	)	
Highland Cellular, Inc.	)	
Petition for Designation as an	)	
Eligible Telecommunications Carrier	)	
in the Commonwealth of Virginia	)	

#### MEMORANDUM OPINION AND ORDER

Adopted: February 24, 2004 Released: April 12, 2004

By the Commission: Commissioners Copps and Adelstein issuing separate statements; Commissioner Martin dissenting and issuing a separate statement.

#### INTRODUCTION T.

In this Order, we grant in part and deny in part the petition of Highland Cellular, Inc. (Highland Cellular) to be designated as an eligible telecommunications carrier (ETC) in portions of its licensed service area in the Commonwealth of Virginia pursuant to section 214(e)(6) of the Communications Act of 1934, as amended (the Act). In so doing, we conclude that Highland Cellular, a commercial mobile radio service (CMRS) carrier, has satisfied the statutory eligibility requirements of section 214(e)(1). Specifically, we conclude that Highland Cellular has demonstrated that it will offer and advertise the services supported by the federal universal service support mechanisms throughout the designated service area. Highland Cellular requests ETC designation for a service area that overlaps, among other areas, the study areas of three rural telephone companies.<sup>3</sup> We find that the designation of Highland Cellular as an ETC in a wire center served by Verizon Virginia, Inc. (Verizon Virginia), a non-rural carrier, and certain areas served by two of the three rural companies serves the public interest and furthers the goals of universal service. As explained below, with regard to the study area of Verizon South, Inc. (Verizon South) and the Saltville wire center of United Telephone Company — Southeast Virginia (United Telephone) we do not find that ETC designation would be in the public interest.

<sup>&</sup>lt;sup>1</sup> Highland Cellular, Inc., Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, filed Sep. 19, 2002 (Highland Cellular Petition).

<sup>&</sup>lt;sup>2</sup> 47 U.S.C. § 214(e)(1).

<sup>&</sup>lt;sup>3</sup> The remainder of Highland Cellular's requested service area falls within the service area of Verizon Virginia, a non-rural telephone company.

- 2. Highland Cellular is licensed to serve the entire study area of only one of the three rural companies for which it seeks ETC designation-Burkes Garden Telephone Company, Inc. (Burkes Garden).<sup>4</sup> Because Highland Cellular is licensed to serve only part of the study areas of the other two incumbent rural telephone companies, Highland Cellular has requested that we redefine the service areas of these rural telephone companies for ETC designation purposes, in accordance with section 214(e)(5) of the Act.<sup>5</sup> We agree to the service area redefinition proposed by Highland Cellular for the service area of United Telephone, subject to agreement by the Virginia State Corporation Commission (Virginia Commission) in accordance with applicable Virginia Commission requirements. We find that the Virginia Commission's first-hand knowledge of the rural areas in question uniquely qualifies it to examine the redefinition proposal and determine whether it should be approved.<sup>6</sup> Because we do not designate Highland Cellular as an ETC in Verizon South's study area, we do not redefine this service area.
- 3. In response to a request from the Commission, the Federal-State Joint Board on Universal Service (Joint Board) is currently reviewing: (1) the Commission's rules relating to the calculation of high-cost universal service support in areas where a competitive ETC is providing service; (2) the Commission's rules regarding support for non-primary lines; and (3) the process for designating ETCs. Some commenters in that proceeding have raised concerns about the rapid growth of high-cost universal service support and the impact of such growth on consumers in rural areas. The outcome of that proceeding could potentially impact, among other things, the support that Highland Cellular and other competitive ETCs may receive in the future and the criteria used for continued eligibility to receive support.
- 4. While we await a recommended decision from the Joint Board, we acknowledge the need for a more stringent public interest analysis for ETC designations in rural telephone company service areas. As we concluded in a recent order granting ETC designation to Virginia Cellular in the Commonwealth of Virginia, this framework shall apply to all ETC designations

<sup>&</sup>lt;sup>4</sup> Highland Cellular requests ETC designation in the service areas of the rural telephone companies Burkes Garden Telephone Company, Inc. (Burkes Garden), United Telephone Company – Southeast Virginia (United Telephone), and Verizon South, Inc. – VA (Verizon South). Highland Cellular Petition at 10-13; Highland Cellular, Inc., Amendment to Petition for Designation as an Eligible Telecommunications Carrier, filed Oct. 23, 2002, at 1-2 (Highland Cellular Amendment I).

<sup>&</sup>lt;sup>5</sup> Highland Cellular Petition at 11-13; Highland Cellular Amendment I at 1-2; Highland Cellular, Inc., Second Amendment to Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, filed Feb. 26, 2003 (Highland Cellular Amendment II). Specifically, Highland requests redefinition of the service areas of United Telephone and Verizon South. *Id.* In light of our decision to deny ETC designation for the area served by Verizon South, we do not address Highland Cellular's request to redefine that service area.

<sup>&</sup>lt;sup>6</sup> If the Virginia Commission does not agree to the proposal to redefine the affected rural service areas, we will reexamine our decision with regard to redefining these service areas.

<sup>&</sup>lt;sup>7</sup> See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Order, FCC 02-307 (rel. Nov. 8, 2002) (Referral Order); Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission's Rules Relating to High Cost Universal Service Support and the ETC Process, CC Docket 96-45,18 FCC Rcd 1941, Public Notice (rel. Feb. 7, 2003) (Portability Public Notice).

<sup>&</sup>lt;sup>8</sup> See generally, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, United States Telecom Association's Comments, filed May 5, 2003; Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Verizon's Comments, filed May 5, 2003.

for rural areas pending further action by the Commission. We conclude that the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas. Instead, in determining whether designation of a competitive ETC in a rural telephone company's service area is in the public interest, we weigh numerous factors, including the benefits of increased competitive choice, the impact of multiple designations on the universal service fund, the unique advantages and disadvantages of the competitor's service offering, any commitments made regarding quality of telephone service provided by competing providers, and the competitive ETC's ability to provide the supported services throughout the designated service area within a reasonable time frame. Further, in this Order, we impose as ongoing conditions the commitments Highland Cellular has made on the record in this proceeding. These conditions will ensure that Highland Cellular satisfies its obligations under section 214 of the Act. We conclude that these steps are appropriate in light of the increased frequency of petitions for competitive ETC designations and the potential impact of such designations on consumers in rural areas.

#### II. BACKGROUND

#### A. The Act

- 5. Section 254(e) of the Act provides that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support." Pursuant to section 214(e)(1), a common carrier designated as an ETC must offer and advertise the services supported by the federal universal service mechanisms throughout the designated service area. <sup>12</sup>
- 6. Section 214(e)(2) of the Act provides state commissions with the primary responsibility for performing ETC designations. Section 214(e)(6), however, directs the Commission, upon request, to designate as an ETC accommon carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission. Under section 214(e)(6), the Commission may, with respect to an area served

<sup>&</sup>lt;sup>9</sup> See Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier for the State of Virginia, CC Docket No. 96-45, Memorandum Opinion and Order, FCC 03-338, para. 14 (rel. Jan. 22, 2004) (Virginia Cellular Order).

<sup>10</sup> See infra para. 43.

<sup>11 47</sup> U.S.C. § 254(e).

<sup>12 47</sup> U.S.C. § 214(e)(1).

<sup>&</sup>lt;sup>13</sup> 47 U.S.C. § 214(e)(2). See also Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved Areas, Including Tribal and Insular Areas, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12255, para. 93 (2000) (Twelfth Report and Order).

<sup>14 47</sup> U.S.C. § 214(e)(6). See, e.g., Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota, CC Docket No. 96-45, Memorandum Opinion and Order, 16 FCC Rcd 18133 (2001) (Western Wireless Pine Ridge Order); Pine Belt Cellular, Inc. and Pine Belt PCS, Inc. Petition for Designation as an Eligible Telecommunications Carrier, CC Docket No. 96-45, Memorandum Opinion and Order, 17 FCC Rcd 9589 (Wireline Comp. Bur. 2002); Corr Wireless Communications, LLC Petition for Designation as an Eligible Telecommunications Carrier, CC Docket 96-45, Memorandum Opinion and Order, 17 FCC Rcd 21435 (Wireline Comp. Bur. 2002). We note that the Wireline Competition Bureau has delegated authority to perform ETCdesignations. See Procedures for FCC Designation of Eligible

by a rural telephone company, and shall, in all other cases, designate more than one common carrier as an ETC for a designated service area, consistent with the public interest, convenience, and necessity, so long as the requesting carrier meets the requirements of section 214(e)(1). Before designating an additional ETC for an area served by a rural telephone company, the Commission must determine that the designation is in the public interest. <sup>16</sup>

# B. Commission Requirements for ETC Designation and Redefining the Service Area

- 7. Filing Requirements for ETC Designation. An ETC petition must contain the following: (1) a certification and brief statement of supporting facts demonstrating that the petitioner is not subject to the jurisdiction of a state commission; (2) a certification that the petitioner offers or intends to offer all services designated for support by the Commission pursuant to section 254(c); (3) a certification that the petitioner offers or intends to offer the supported services "either using its own facilities or a combination of its own facilities and resale of another carrier's services;" (4) a description of how the petitioner "advertise[s] the availability of [supported] services and the charges therefor using media of general distribution;" and (5) if the petitioner is not a rural telephone company, a detailed description of the geographic service area for which it requests an ETC designation from the Commission. 17
- 8. <u>Twelfth Report and Order</u>. On June 30, 2000, the Commission released the Twelfth Report and Order which, among other things, sets forth how a carrier seeking ETC designation from the Commission must demonstrate that the state commission lacks jurisdiction to perform the ETC designation. <sup>18</sup> Carriers seeking designation as an ETC for service provided on non-tribal lands must provide the Commission with an "affirmative statement" from the state commission or a court of competent jurisdiction that the carrier is not subject to the state commission's jurisdiction. <sup>19</sup> The Commission defined an "affirmative statement" as "any duly authorized letter, comment, or state commission order indicating that [the state commission] lacks jurisdiction to perform the designation over a particular carrier." The requirement to provide an "affirmative statement" ensures that the state commission has had "a specific opportunity to address and resolve issues involving a state commission's authority under state

<sup>(...</sup>continued from previous page)

Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, Public Notice, 12 FCC Rcd 22947, 22948 (1997) (Section 214(e)(6) Public Notice). The Wireline Competition Bureau was previously named the Common Carrier Bureau.

<sup>15 47</sup> U.S.C. § 214(e)(6).

<sup>&</sup>lt;sup>16</sup> Id.

<sup>&</sup>lt;sup>17</sup> See Section 214(e)(6) Public Notice, 12 FCC Rcd at 22948-49. See also Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling, CC Docket No. 96-45, 15 FCC Rcd 15168 (2000) (Declaratory Ruling), reconpending.

<sup>&</sup>lt;sup>18</sup> See Twelfth Report and Order, 15 FCC Rcd at 12255-65, paras. 93-114.

<sup>19</sup> Twelfth Report and Order, 15 FCC at 12255, para. 93.

<sup>&</sup>lt;sup>20</sup> Twelfth Report and Order, 15 FCC at 12264, para. 113.

law to regulate certain carriers or classes of carriers."21

Redefining a Service Area. Under section 214(e)(5), "[i]n the case of an area served by a rural telephone company, 'service area' means such company's 'study area' unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company."<sup>22</sup> Section 54.207(d) permits the Commission to initiate a proceeding to consider a definition of a service area that is different from a rural telephone company's study area as long as the Commission seeks agreement on the new definition with the applicable state commission. 23 Under section 54.207(d)(1), the Commission must petition a state commission with the proposed definition according to that state commission's procedures.<sup>24</sup> In that petition, the Commission must provide its proposal for redefining the service area and its decision presenting reasons for adopting the new definition, including an analysis that takes into account the recommendations of the Federal-State Joint Board on Universal Service (Joint Board). 25 When the Joint Board recommended that the Commission retain the current study areas of rural telephone companies as the service areas for the rural telephone companies, the Joint Board made the following observations: (1) the potential for "cream skimming" is minimized by retaining study areas because competitors, as a condition of eligibility, must provide services throughout the rural telephone company's study area; (2) the Act, in many respects, places rural telephone companies on a different competitive footing from the other local telephone companies; and (3) there would be an administrative burden imposed on rural telephone companies by requiring them to calculate costs at something other than the study area level. 26

## C. Highland Cellular's Petition

10. On September 19, 2002, Highland Cellular filed with this Commission a petition pursuant to section 214(e)(6) seeking designation as an ETC throughout its licensed service area in the Commonwealth of Virginia.<sup>27</sup> Highland Cellular contends that the Virginia Commission

<sup>&</sup>lt;sup>21</sup> Twelfth Report and Order, 15 FCC at 12264, para. 113 (citations omitted).

<sup>&</sup>lt;sup>22</sup> 47 U.S.C. § 214(e)(5).

<sup>&</sup>lt;sup>23</sup> See 47 C.F.R. § 54.207(d). Any proposed definition will not take effect until both the Commission and the state commission agree upon the new definition. See 47 C.F.R. § 54.207(d)(2).

<sup>&</sup>lt;sup>24</sup> See 47 C.F.R. § 54.207(d)(1).

<sup>&</sup>lt;sup>25</sup> See 47 C.F.R § 54.207(d)(1).

<sup>&</sup>lt;sup>26</sup> See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Recommended Decision, 12 FCC Rcd 87, 179-80, paras. 172-74 (1996) (1996 Recommended Decision).

<sup>&</sup>lt;sup>27</sup> See generally, Highland Cellular Petition. On October 2, 2002, the Wireline Competition Bureau released a Public Notice seeking comment on the Highland Cellular Petition. See Wireline Competition Bureau Seeks Comment on Highland Cellular Telephone, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of Virginia, CC Docket No. 96-45, Public Notice, DA 02-2487 (rel. Oct. 2, 2002); In the Matter of Federal-State Joint Board on Universal Service, CC Docket 96-45, Comments of the Cellular Telecommunications and Internet Association, filed Oct. 15, 2002 (CTIA Comments); In the Matter of Highland Cellular Telephone, Inc., Petition for Designation as and Eligible Telecommunications Carrier in Virginia, Comments of the Telephone Association of Maine, filed Oct. 15, 2002 (TAM Comments); In the Matter of Federal-State Joint Board on Universal Service, CC Docket 96-45, Comments of Verizon, filed Oct. 15, 2002 (Verizon Comments); In the Matter of Federal-State Joint Board on Universal Service, CC Docket 96-45, Reply Comments of Highland Cellular, Inc., filed Oct. 22 (Highland Cellular Reply Comments).

has issued an "affirmative statement" that the Virginia Commission does not have jurisdiction to designate a CMRS carrier as an ETC. Accordingly, Highland Cellular asks the Commission to designate Highland Cellular as an ETC pursuant to section 214(e)(6). Highland Cellular also maintains that it satisfies the statutory and regulatory prerequisites for ETC designation and that designating Highland Cellular as an ETC will serve the public interest. <sup>29</sup>

11. Highland Cellular also requests that the Commission redefine the service areas of two incumbent rural telephone companies, United Telephone and Verizon South, because it is not able to serve the entire study area of each of these companies. Highland Cellular states that as a wireless carrier, it is restricted to only providing facilities-based service in those areas where it is licensed by the Commission. It adds that it is not picking and choosing the "lowest cost exchanges" of the affected rural telephone companies, but instead is basing its requested ETC area solely on its licensed service area and proposes to serve the entirety of that area. Highland Cellular further contends that the proposed redefinition of the rural telephone companies' service areas is consistent with the recommendations regarding rural telephone company study areas, as set forth by the Joint Board in its *Recommended Decision*.

#### III. DISCUSSION

After careful review of the record before us, we find that Highland Cellular has met all the requirements set forth in section 214(e)(1) and (e)(6) to be designated as an ETC by this Commission for the portions of its licensed service area described herein. First, we find that Highland Cellular has demonstrated that the Virginia Commission lacks the jurisdiction to perform the designation and that the Commission therefore may consider Highland Cellular's petition under section 214(e)(6). Second, we conclude that Highland Cellular has demonstrated that it will offer and advertise the services supported by the federal universal service support mechanisms throughout the designated service area upon designation as an ETC in accordance with section 214(e)(1). In addition, we find that designation of Highland Cellular as an ETC in certain areas served by rural telephone companies serves the public interest and furthers the goals of universal service by better ensuring that consumers in high-cost and rural areas of Virginia have access to the services supported by universal service at affordable rates. Pursuant to our authority under section 214(e)(6), we therefore designate Highland Cellular as an ETC for parts of its licensed service area in the Commonwealth of Virginia as set forth below. As explained below, however, we do not designate Highland Cellular as an ETC in the study area of the rural telephone company, Verizon South, and the Saltville wire center of the rural telephone company, United Telephone.<sup>34</sup> In areas where Highland Cellular's proposed service areas do not cover the entire study area of a rural telephone company, Highland Cellular's ETC designation shall be

<sup>&</sup>lt;sup>28</sup> Highland Cellular Petition at 3-4.

<sup>&</sup>lt;sup>29</sup> Highland Cellular Petition at 4-9, 15-18; Highland Cellular Amendment I at 2.

<sup>&</sup>lt;sup>30</sup> Highland Cellular Petition at 10-13; Highland Cellular Reply Comments at 2-3; Highland Cellular Amendment I at 1-2; Highland Cellular Amendment II at 2.

<sup>&</sup>lt;sup>31</sup> Highland Cellular Petition at 13; Highland Cellular Amendment I at 1-2.

<sup>32</sup> Highland Cellular Petition at 13.

<sup>33</sup> Id. at 13-15. See also 1996 Recommended Decision, 12 FCC Rcd at 179-80, paras. 172-74.

<sup>34</sup> See infra paras. 29-33.

subject to the Virginia Commission's agreement with our new definition for the rural telephone company service areas. In all other areas, as described herein, Highland Cellular's ETC designation is effective immediately. Finally, we note that the outcome of the Commission's pending proceeding, now before the Joint Board, examining the rules relating to high-cost universal service support in competitive areas could potentially impact the support that Highland Cellular and other ETCs may receive in the future. This Order is not intended to prejudge the outcome of that proceeding. We also note that Highland Cellular always has the option of relinquishing its ETC designation and its corresponding benefits and obligations to the extent that it is concerned about its long-term ability to provide supported services in the affected rural study areas. The support of the support of the support of the support of the extent that it is concerned about its long-term ability to provide supported services in the affected rural study areas.

#### A. Commission Authority to Perform the ETC Designation

- 13. We find that Highland Cellular has demonstrated that the Virginia Commission lacks the jurisdiction to perform the requested ETC designation and the Commission has authority to consider Highland Cellular's petition under section 214(e)(6) of the Act. Highland Cellular submitted as an "affirmative statement" an order issued by the Virginia Commission addressing an application filed by Virginia Cellular, LLC (Virginia Cellular) seeking ETC designation. The Virginia Commission Concluded that it "has not asserted jurisdiction over CMRS carriers and that the Applicant should apply to the FCC for ETC designation." The Virginia Commission concluded that it "has not asserted jurisdiction over CMRS carriers and that the Applicant should apply to the
- Commission was given the specific opportunity to address and resolve the issue of whether it has authority to regulate CMRS providers as a class of carriers when it rendered its decision in the *Virginia Commission Order*.<sup>39</sup> We find it sufficient that the Virginia Commission indicated that it does not have jurisdiction over CMRS carriers and that the Federal Communications Commission is the proper venue for CMRS carriers seeking ETC designation in the Commonwealth of Virginia. Therefore, based on this statement by the Virginia Commission, we find the Virginia Commission lacks jurisdiction to designate Highland Cellular as an ETC and this Commission has authority to perform the requested ETC designation in the Commonwealth of Virginia pursuant to section 214(e)(6).<sup>40</sup>

<sup>35</sup> See Portability Public Notice, 18 FCC Rcd at 1941.

<sup>&</sup>lt;sup>36</sup> See Declaratory Ruling, 15 FCC Rcd at 15173; see also 47 U.S.C. § 214(e)(4).

<sup>&</sup>lt;sup>37</sup> See Highland Cellular Petition at Exhibit A (Virginia Corporation Commission, Virginia Cellular, LLC, Order, Case Nos. PUC970135 & PUC010263 at 4-5 (Apr. 9, 2002) (Virginia Commission Order)).

<sup>&</sup>lt;sup>38</sup> Virginia Commission Order at 4-5. Virginia Cellular's application was the first time a CMRS carrier filed for ETC designation before the Virginia Commission. *See id.* at 2.

<sup>&</sup>lt;sup>39</sup> See Twelfth Report and Order, 15 FCC Rcd at 12264, para. 113. See also RCC Holdings, Inc. Petition for Designation as and Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama, CC Docket No. 96-45, Memorandum Opinion and Order, 17 FCC Rcd 23532, 23537, para. 13 (Wireline Comp. Bur. 2002) (RCC Holdings ETC Designation Order) (finding that an order from a prior proceeding involving unaffiliated CMRS providers seeking ETC status constituted an "affirmative statement" for the purposes satisfying section 214(e)(6) of the Act).

<sup>&</sup>lt;sup>40</sup> 47 U.S.C. § 214(e)(6).

## B. Offering and Advertising the Supported Services

- Offering the Services Designated for Support. We find that Highland Cellular has 15. demonstrated through the required certifications and related filings that it now offers, or will offer upon designation as an ETC, the services supported by the federal universal service support mechanism. As noted in its petition, Highland Cellular is an "A2-Band" cellular carrier for the Virginia 2 Rural Service Area, serving the counties of Bland and Tazewell. 41 Highland Cellular states that it currently provides all of the services and functionalities enumerated in section 54.101(a) of the Commission's rules throughout its cellular service area in Virginia. 42 Highland Cellular certifies that it has the capability to offer voice-grade access to the public switched network, and the functional equivalents to DTMF signaling, single-party service, access to operator services, access to interexchange services, access to directory assistance, and toll limitation for qualifying low-income consumers. 43 Highland Cellular also complies with applicable law and Commission directives on providing access to emergency services. 44 In addition, although the Commission has not set a minimum local usage requirement, Highland Cellular certifies it will comply with "any and all minimum local usage requirements adopted by the FCC" and it intends to offer a number of local calling plans as part of its universal service offering. 45 As discussed below, Highland Cellular has committed to report annually its progress in achieving its build-out plans at the same time it submits its annual certification required under sections 54.313 and 54.314 of the Commission's rules. 46
- 16. Highland Cellular has also made specific commitments to provide service to requesting customers in the service areas in which it is designated as an ETC. Highland Cellular states that if a request is made by a potential customer within its existing network, Highland Cellular will provide service immediately using its standard customer equipment.<sup>47</sup> In instances where a request comes from a potential customer within Highland Cellular's licensed service area but outside its existing network coverage, it will take a number of steps to provide service that include determining whether: (1) the requesting customer's equipment can be modified or replaced to provide service; (2) a roof mounted antenna or other equipment can be deployed to provide service; (3) adjustments can be made to the nearest cell tower to provide service; (4) there are any other adjustments that can be made to network or customer facilities to provide service; (5) it can offer resold services from another carrier's facilities to provide service; and (6) an additional cell site, cell extender, or repeater can be employed or can be constructed to

<sup>&</sup>lt;sup>41</sup> Highland Cellular Petition at 1.

<sup>&</sup>lt;sup>42</sup> Id. at 2. The Commission has defined the services that are to be supported by the federal universal service support mechanisms to include: (1) voice grade access to the public switched network; (2) local usage; (3) Dual Tone Multifrequency (DTMF) signaling or its functional equivalent; (4) single-party service or its functional equivalent; (5) access to emergency services, including 911 and enhanced 911; (6) access to operator services; (7) access to interexchange services; (8) access to directory assistance; and (9) toll limitation for qualifying low-income customers. 47 C.F.R. § 54.101(a).

<sup>&</sup>lt;sup>43</sup> Highland Cellular Petition at 4-8 and Exhibit B.

<sup>44</sup> See 47 C.F.R. § 54.101(a)(5); Highland Cellular Petition at 7.

<sup>&</sup>lt;sup>45</sup> Highland Cellular Petition at 5-6 and Exhibit B.

<sup>&</sup>lt;sup>46</sup> See infra para. 43; Letter from David LaFuria, Lukas, Nace, Gutierrez & Sachs to Marlene H. Dortch, FCC, filed Nov. 19, 2003 (Highland Cellular November 19 Supplement).

<sup>&</sup>lt;sup>47</sup> Highland Cellular November 19 Supplement, at 3.

provide service.<sup>48</sup> In addition, if after following these steps, Highland Cellular still cannot provide service, it will notify the requesting party and include that information in an annual report filed with the Commission detailing how many requests for service were unfulfilled for the past year.<sup>49</sup>

- 17. Highland Cellular has further committed to use universal service support to further improve its universal service offering by constructing new cellular sites in sparsely populated areas within its licensed service area but outside its existing network coverage. Highland Cellular states that it will modify its construction plans based on the areas where ETC designation is granted. Highland Cellular notes that the parameters of its build-out plans may evolve over time as it responds to consumer demand. In connection with its annual reporting obligations, Highland Cellular will submit detailed information on its progress toward meeting build-out plans.
- 18. Offering the Supported Services Using a Carriers's Own Facilities. Highland Cellular has demonstrated that it satisfies the requirement of section 214(e)(1)(A) that it offer the supported services using either its own facilities or a combination of its own facilities and resale of another carrier's services.<sup>54</sup> Highland Cellular states that it intends to provide the supported services using its cellular network infrastructure, which includes "the same antenna, cell-site, tower, trunking, mobile switching, and interconnection facilities used by the company to serve its existing conventional mobile cellular service customers." We find that this certification is sufficient to satisfy the facilities requirement of section 214(e)(1)(A).
- 19. Advertising the Supported Services. We conclude that Highland Cellular has demonstrated that it satisfies the requirement of section 214(e)(1)(B) to advertise the availability of the supported services and the charges therefor using media of general distribution. <sup>56</sup> Highland Cellular certifies that it will "use media of general distribution that it currently employs

<sup>&</sup>lt;sup>48</sup> Highland Cellular November 19 Supplement, at 3-4.

<sup>&</sup>lt;sup>49</sup> Highland Cellular November 19 Supplement at 4, n. 7 (agreeing to follow the service provisioning commitments made by Virginia Cellular during its ETC designation proceeding). *See Virginia Cellular* Order, FCC 03-338, at para. 14.

<sup>&</sup>lt;sup>50</sup> Supplement to Highland Cellular, Inc. Petition for Designation as an ETC in the Commonwealth of Virginia, filed April 8, 2003 at 3-4 (Highland Cellular April 8 Supplement).

<sup>&</sup>lt;sup>51</sup> See Highland Cellular December 12 Supplement at 5. For example, to date Highland Cellular has committed to construct cell sites only in areas for which we deny ETC designation – notably in the Jewell Ridge, Richlands, and Tazewell wire centers in the Verizon South rural study area. See Highland Cellular November 19 Supplement at 4-5. In a subsequent filing, Highland Cellular described alternative build-out plans should the Commission limit Highland Cellular's ETC designation to complete wire centers. See Highland Cellular December 12 Supplement at 5 (proposing cell sites in the Verizon South and Burkes Garden rural study areas). We assume that Highland Cellular's build-out plans will change as a result of this Order.

<sup>&</sup>lt;sup>52</sup> See Highland Cellular November 19 Supplement at 5; Letter from David LaFuria, Lukas, Nace, Gutierrez & Sachs to Marlene H. Dortch, FCC, filed Dec. 12, 2003 (Highland Cellular December 12 Supplement).

<sup>53</sup> See infra para. 43.

<sup>&</sup>lt;sup>54</sup> 47 U.S.C. § 214(e)(1)(A).

<sup>&</sup>lt;sup>55</sup> Highland Cellular Petition at 8-9.

<sup>&</sup>lt;sup>56</sup> 47 U.S.C. § 214(e)(1)(B).

to advertise its universal service offerings throughout the service areas designated by the Commission."<sup>57</sup> In addition, Highland Cellular details alternative methods that it will employ to advertise the availability of its services. For example, Highland Cellular will provide notices at local unemployment, social security, and welfare offices so that unserved consumers can learn about Highland Cellular's service offerings and learn about Lifeline and Linkup discounts.<sup>58</sup> Highland Cellular also commits to publicize locally the construction of all new facilities in unserved or underserved areas so customers are made aware of improved service.<sup>59</sup> We find that Highland Cellular's certification and its additional commitments to advertise its service offerings satisfy section 214(e)(1)(B). In addition, as the Commission has stated in prior decisions, because an ETC receives universal service support only to the extent that it serves customers, we believe that strong economic incentives exist, in addition to the statutory obligation, for an ETC to advertise its universal service offering in its designated service area.<sup>60</sup>

# C. Public Interest Analysis

- 20. We conclude that it is "consistent with the public interest, convenience, and necessity" to designate Highland Cellular as an ETC for the portion of its requested service area that is served by the non-rural telephone company, Verizon Virginia. We also conclude that it is in the public interest to designate Highland Cellular as an ETC in Virginia in the study area served by the rural telephone company, Burkes Garden and the Bland and Ceres wire centers served by the rural telephone company, United Telephone. In determining whether the public interest is served, the Commission places the burden of proof upon the ETC applicant. We conclude that Highland Cellular has satisfied the burden of proof in establishing that its universal service offering in these areas will provide benefits to rural consumers. We do not designate Highland Cellular as an ETC, however, for the study area of Verizon South and the Saltville wire center of United Telephone because we find that Highland Cellular has not satisfied its burden of proof in this instance. <sup>61</sup>
- 21. Non-Rural Study Areas. We conclude that it is "consistent with the public interest, convenience, and necessity" to designate Highland Cellular as an ETC for the portion of its requested service area that is served by the non-rural telephone company, Verizon Virginia. <sup>62</sup> We note that the Common Carrier Bureau previously found designation of additional ETCs in areas served by non-rural telephone companies to be *per se* in the public interest based upon a demonstration that the requesting carrier complies with the statutory eligibility obligations of section 214(e)(1) of the Act. <sup>63</sup> We do not believe that designation of an additional ETC in a non-rural telephone company's study area based merely upon a showing that the requesting carrier

<sup>&</sup>lt;sup>57</sup> Highland Cellular Petition at 9.

<sup>58</sup> Highland Cellular November 19 Supplement at 5.

<sup>&</sup>lt;sup>59</sup> Highland Cellular November 19 Supplement at 5.

<sup>&</sup>lt;sup>60</sup> See Western Wireless Pine Ridge Order, 16 FCC Rcd at 18137, para. 10.

<sup>61</sup> See infra paras. 29-33.

<sup>62</sup> See 47 U.S.C. § 214(e)(6). See also Appendix A.

<sup>&</sup>lt;sup>63</sup> See, e.g., Cellco Partnership d/b/a Bell Atlantic Mobile Petition for Designation as an Eligible Telecommunications Carrier, CC Docket No. 96-45, Memorandum Opinion and Order, 16 FCC Rcd 39 (Com. Car. Bur. 2000).

complies with section 214(e)(1) of the Act will necessarily be consistent with the public interest in every instance. We nevertheless conclude that Highland Cellular's public interest showing here is sufficient based on the detailed commitments Highland Cellular made to ensure that it provides high quality service throughout the proposed rural and non-rural service areas; indeed, given our finding that Highland Cellular has satisfied the more rigorous public interest analysis for certain rural study areas, it follows that its commitments satisfy the public interest requirements for non-rural areas. <sup>64</sup> We also note that no parties oppose Highland Cellular's request for ETC designation in the study area of this non-rural telephone company. We therefore conclude that Highland Cellular has demonstrated that its designation as an ETC in the study area of this non-rural telephone company, is consistent with the public interest, as required by section 214(e)(6). <sup>65</sup> We further note that the Joint Board is reviewing whether to modify the public interest analysis used to designate both non-rural and rural ETCs under section 214(e) of the Act. <sup>66</sup> The outcome of that proceeding could impact the Commission's public interest analysis for future ETC designations in non-rural telephone company service areas.

- Rural Study Areas. Based on the record before us, we conclude that grant of this ETC designation for the requested rural study areas, in part, is consistent with the public interest. In considering whether designation of Highland Cellular as an ETC will serve the public interest. we have considered whether the benefits of an additional ETC in the wire centers for which Highland Cellular seeks designation outweigh any potential harms. We note that this balancing of benefits and costs is a fact-specific exercise. In determining whether designation of a competitive ETC in a rural telephone company's service area is in the public interest, we weigh the benefits of increased competitive choice, the impact of the designation on the universal service fund, the unique advantages and disadvantages of the competitor's service offering, any commitments made regarding quality of telephone service, and the competitive ETC's ability to satisfy its obligation to serve the designated service areas within a reasonable time frame. We recognize that as part of its review of the ETC designation process in the pending proceeding examining the rules relating to high-cost support in competitive areas, the Commission may adopt a different framework for the public interest analysis of ETC applications. This Order does not prejudge the Joint Board's deliberations in that proceeding and any other public interest framework that the Commission might ultimately adopt.
- 23. Highland Cellular's universal service offering will provide benefits to customers in situations where they do not have access to a wireline telephone. For instance, Highland Cellular has committed to serve residences that do not have access to the public switched network through the incumbent telephone company. <sup>67</sup> Also, the mobility of Highland Cellular's wireless service will provide other benefits to consumers. For example, the mobility of telecommunications assists consumers in rural areas who often must drive significant distances to places of employment, stores, schools, and other critical community locations. In addition, the availability of a wireless universal service offering provides access to emergency services that can mitigate the unique risks of geographic isolation associated with living in rural

<sup>&</sup>lt;sup>64</sup> See Highland Cellular November 19 Supplement at 1-7.

<sup>65</sup> See 47 U.S.C. § 214(e)(6).

<sup>&</sup>lt;sup>66</sup> See Portability Public Notice, 18 FCC Rcd at 1954-55, para. 33.

<sup>&</sup>lt;sup>67</sup> Highland Cellular November 19 Supplement at 3-4.

communities. 68 Highland Cellular also submits that, because its local calling area is larger than those of the incumbent local exchange carriers it competes against, Highland Cellular's customers will be subject to fewer toll charges. 69

- 24. We acknowledge arguments made in the record that wireless telecommunication offerings may be subject to dropped calls and poor coverage. In addition, wireless carriers often are not subject to mandatory service quality standards. Highland Cellular has committed to mitigate these concerns. Highland Cellular assures the Commission that it will alleviate dropped calls by using universal service support to build new towers and facilities to offer better coverage. As evidence of its commitment to high service quality, Highland Cellular has also committed to comply with the Cellular Telecommunications Industry Association Consumer Code for Wireless Service, which sets out certain principles, disclosures, and practices for the provision of wireless service. In addition, Highland Cellular has committed to provide the Commission with the number of consumer complaints per 1,000 handsets on an annual basis. Therefore, we find that Highland Cellular's commitment to provide better coverage to unserved areas and its other commitments discussed herein adequately address any concerns about the quality of its wireless service.
- 25. Although we find that grant of this ETC designation will not dramatically burden the universal service fund, we are increasingly concerned about the impact on the universal service fund due to the rapid growth in the number of competitive ETCs. <sup>73</sup> Specifically, although competitive ETCs only receive a small percentage of all high-cost universal service support, the amount of high-cost support distributed to competitive ETCs is growing at a

<sup>&</sup>lt;sup>68</sup> Highland Cellular Petition at 16 (citing Smith Bagley, Inc., Order, Decision No. 63269, Docket No. T-02556A-99-0207 (Ariz. Corp. Comm'n Dec. 15, 2001) (finding that competitive entry provides a potential solution to "health and safety risks associated with geographic isolation"). See also Twelfth Report and Order, 15 FCC Rcd at 12212, para. 3.

<sup>&</sup>lt;sup>69</sup> See Highland Cellular Petition at 16, 17; Highland Cellular April 8 Supplement at 1-3.

<sup>70</sup> See supra para 17.

<sup>&</sup>lt;sup>71</sup> Highland Cellular November 19 Supplement, at 1; CTIA, Consumer Code for Wireless Service, available at <a href="http://www.wow-com.com/pdf/The\_Code.pdf">http://www.wow-com.com/pdf/The\_Code.pdf</a>. Under the CTIA Consumer Code, wireless carriers agree to: (1) disclose rates and terms of service to customers; (2) make available maps showing where service is generally available; (3) provide contract terms to customers and confirm changes in service; (4) allow a trial period for new service; (5) provide specific disclosures in advertising; (6) separately identify carrier charges from taxes on billing statements; (7) provide customers the right to terminate service for changes to contract terms; (8) provide ready access to customer service; (9) promptly respond to consumer inquiries and complaints received from government agencies; and (10) abide by policies for protection of consumer privacy. See id.

<sup>&</sup>lt;sup>72</sup> See infra para. 43 (requesting that Highland Cellular provide consumer complaint data on October 1 of each year).

<sup>&</sup>lt;sup>73</sup> For example, assuming, that Highland Cellular captures each and every customer located in the two affected study areas, the overall size of the high-cost support mechanisms would not significantly increase because the total amount of high-cost universal service support available to incumbent carriers in the rural study areas where we grant Highland Cellular ETC designation is only approximately 0.04 percent of the total high-cost support available to all ETCs. See Federal Universal Service Support Mechanisms Fund Size Projections for the Fourth Quarter of 2003, Appendix HC 1 (Universal Service Administrative Company, January 31, 2002) (determining that the total amount of high-cost universal service support available to incumbent carriers in the affected rural study areas is projected to be \$360,030 out of a total of \$857,903,276 in the fourth quarter of 2003). We note, however, in light of the rapid growth in competitive ETCs, discussed above, comparing the impact of one competitive ETC on the overall fund may be inconclusive.

dramatic pace. For example, in the first quarter of 2001, three competitive ETCs received approximately \$2 million or 0.4 percent of high-cost support. 74 In the fourth quarter of 2003, 112 competitive ETCs received approximately \$32 million or 3.7 percent of high-cost support. 75 This concern has been raised by parties in this proceeding, especially as it relates to the longterm sustainability of universal service high-cost support. Specifically, Verizon Telephone Companies (Verizon) argues that the Commission should not rule on the Highland Cellular ETC petition until after it has had an opportunity to initiate a broader rulemaking on high-cost fund issues. 76 In particular, Verizon contends that the Commission should reexamine the rules concerning portability of support for ETCs and the designation of ETCs for areas different from those served by the incumbent LEC. 77 We recognize that Verizon raises important issues regarding universal service high-cost support. 78 As discussed above, the Commission has asked the Joint Board to examine, among other things, the Commission's rules relating to high-cost universal service support in service areas in which a competitive ETC is providing service, as well as the Commission's rules regarding support for second lines. <sup>79</sup> We note that the outcome of the Commission's pending proceeding examining the rules relating to high-cost support in competitive areas could potentially impact, among other things, the support that Highland Cellular and other competitive ETCs may receive in the future. It is our hope that the Commission's pending rulemaking proceeding also will provide a framework for assessing the overall impact of competitive ETC designations on the universal service mechanisms.

26. We further conclude that designation of Highland Cellular as an ETC in the Burkes Garden study area and the Bland and Ceres wire centers served by United Telephone does not create rural creamskimming concerns. As discussed below, however, we conclude that designation of Highland Cellular as an ETC in the study area of Verizon South and the Saltville wire center does raise creamskimming and other concerns, and therefore would be inconsistent with the public interest. Rural creamskimming occurs when competitors serve only the low-cost, high revenue customers in a rural telephone company's study area. Because Highland Cellular requests ETC designation in the entire study area of Burkes Garden, designation of Highland Cellular as an ETC in this portion of its licensed service area does not create creamskimming

<sup>&</sup>lt;sup>74</sup> See Federal Universal Service Support Mechanisms Fund Size Projections for the First Quarter of 2001 (Universal Service Administrative Company, January 31, 2002)

<sup>&</sup>lt;sup>75</sup> At the same time, we acknowledge that high-cost support to incumbent ETCs has grown significantly in real and percentage terms over the same period. *See generally, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Cellular Telecommunications Industry Association's Comments, filed May 5, 2003.

<sup>&</sup>lt;sup>76</sup> See Verizon Comments at 2.

<sup>&</sup>lt;sup>77</sup> See id. at 4.

<sup>&</sup>lt;sup>78</sup> In addition, the Telephone Association of Maine (TAM) filed comments requesting that the Commission use this proceeding to indicate how wireless ETCs should be regulated by states after receiving ETC designation. See TAM Comments at 1. Specifically, TAM requests that the Commission expressly designate state commissions as the appropriate regulatory agencies to oversee consumer protection matters and service offerings supported by universal service for all ETCs, including wireless carriers. See TAM Comments at 3. We decline to address this issue because it is outside the scope of the ETC petition.

<sup>79</sup> See Portability Public Notice.

<sup>&</sup>lt;sup>80</sup> See 1996 Recommended Decision, 12 FCC Rcd at 180, para. 172. "Creamskimming" refers to instances in which a carrier serves only the customers that are the least expensive to serve, thereby undercutting the ILEC's ability to provide service throughout the area. See, e.g., Universal Service Order, 12 FCC Rcd at 8881-2, para. 189.

concerns. We note, however, that because the contours of Highland Cellular's CMRS licensed area differ from United Telephone's and Verizon South's service areas, Highland Cellular will be unable to provide facilities-based service to the entire study areas of these two companies. In this case, however, Highland Cellular commits to provide universal service throughout its licensed service area. <sup>81</sup> It therefore does not appear that Highland Cellular is deliberately seeking to enter only certain portions of these companies' study areas in order to creamskim.

- 27. At the same time, we recognize that, for reasons beyond a competitive carrier's control, the lowest cost portion of a rural study area may be the only portion of the study area that a wireless carrier is licensed to serve. Under these circumstances, granting a carrier ETC designation for only its licensed portion of the rural study may have the same effect on the ILEC as rural creamskimming.
- 28. We have analyzed the record before us in this matter and find that, for the study area of United Telephone, Highland Cellular's designation as an ETC is unlikely to undercut the incumbent's ability to serve the entire study area. Our analysis of the population density of each of the affected wire centers for United Telephone reveals that Highland Cellular will not be serving only low-cost areas to the exclusion of high-cost areas. Although there are other factors that define high-cost areas, a lower population density indicates a higher cost area. The average population density for the United Telephone wire centers for which we grant Highland Cellular ETC designation is 19.5 persons per square mile and the average population density for United Telephone's remaining wire centers is 73.21 persons per square mile.
- 29. We conclude, however, that it would not be in the public interest to designate Highland Cellular as an ETC in the study area of Verizon South. 84 Highland Cellular's licensed

<sup>&</sup>lt;sup>81</sup> See Highland Cellular Petition at 9.

<sup>&</sup>lt;sup>82</sup> See Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, CC Docket No. 00-256, Second Report and Order and Further Notice of Proposed Rulemaking, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Fifteenth Report and Order, Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation, CC Docket No. 98-77, Report and Order, Prescribing the Authorized Rate of Return From Interstate Services of Local Exchange Carriers, CC Docket No. 98-166, Report and Order, 16 FCC Rcd 19613, 19628, para. 28 (2001) (MAG Order), recon. pending (discussing Rural Task Force White Paper # 2 at <a href="http://www.wutc.wa.gov/rtf">http://www.wutc.wa.gov/rtf</a>).

<sup>&</sup>lt;sup>83</sup> Letter from David LaFuria and Steven M. Chernoff, Lukas, Nace, Gutierrez & Sachs to Marlene H. Dortch, FCC, filed Jan. 23, 2004 (Highland Cellular January 23 Supplement).

Verizon opposes the designation of Highland Cellular as an ETC in Verizon South's study area because, among other things, Highland Cellular wrongly classified six of the seven wire centers for which it seeks ETC designation as non-rural and therefore failed to make the necessary showing for ETC designation for these areas. See Verizon Comments at 2-3. Specifically, because these wire centers are served by rural telephone companies, Verizon notes that Highland Cellular was required to describe the geographic area for these wire centers for which it seeks ETC designation and demonstrate that granting ETC status in these areas would serve the public interest. See Verizon Comments at 3; 47 U.S.C. § 214(e)(6). In response to the arguments raised by Verizon in its comments, Highland Cellular amended its petition in order to correctly reclassify Verizon South as a rural telephone company. See Highland Cellular Amendment I at 1-2, revised Exhibit D, and revised Exhibit F. Moreover, Highland Cellular stated in its amendment that the public interest analysis in its original petition was applicable to the study area of Verizon South. See Highland Cellular Amendment I at 2. Although we find that Highland's amendment sufficiently resolves these specific concerns raised by Verizon, as explained in the text, however, it would not be in the public interest to designate Highland Cellular as an ETC in Verizon South's study area.

CMRS service area covers only certain wire centers in the study area of Verizon South. <sup>85</sup> Based on our examination of the population densities of the wire centers in Verizon South's study area, and using the same analysis used by the Commission in the *Virginia Cellular Order*, <sup>86</sup> we find that designating Highland Cellular as an ETC in Verizon South's study area would not be in the public interest.

- 30. In the *Virginia Cellular Order*, the Commission granted in part and denied in part the petition of Virginia Cellular LLC (Virginia Cellular) to be designated as an ETC throughout parts of its licensed service area in the Commonwealth of Virginia. <sup>87</sup> In that proceeding, Virginia Cellular requested ETC designation for the study areas of six rural telephone companies. <sup>88</sup> The Commission found that the designation of Virginia Cellular as an ETC in certain areas served by five of the six rural telephone companies served the public interest by promoting the provision of new technologies to consumers in high-cost and rural areas of Virginia. <sup>89</sup> However, the Commission denied designation of Virginia Cellular as an ETC in one rural incumbent LEC's study area because Virginia Cellular would only have served the lowest-cost, highest-density wire center within the incumbent LEC's study area. <sup>90</sup>
- 31. In this case, we find that the ETC designation of Highland Cellular in the portion of its licensed service area that covers only certain wire centers of Verizon South raises creamskimming concerns similar to those identified by the Commission in the *Virginia Cellular Order*. We agree with the arguments of Verizon that Highland Cellular should not be allowed to serve only the low-cost customers in a rural telephone company's study area. 91 Our analysis of the population data for each of the affected rural wire centers, including the wire centers in Verizon South's study area that are not covered by Highland Cellular's licensed service area, reveals that Highland Cellular would be primarily serving customers in the low-cost and high-density portion of Verizon South's study area. 92 Specifically, although the wire centers in Verizon South's study area that Highland Cellular would be able to serve includes two low density wire centers, approximately 94 percent of Highland Cellular's potential customers in Verizon South's study area would be located in the four highest-density, and thus presumably

<sup>&</sup>lt;sup>85</sup> Verizon South's study area consists of the Jewell Ridge, Richlands, Bluefield, Pocahontas, Rocky Gap, Tazewell, Big Prater, Big Rock, Dwight, Grundy, Hurley, Maxie, and Oakwood wire centers. Highland Cellular is licensed to completely serve the Bluefield, Pocahontas, Rocky Gap, and Tazewell wire centers. In addition, Highland Cellular is licensed to partially serve the Jewell Ridge and Richlands wire centers. See Highland Cellular Amendment I at Exhibit F.

<sup>&</sup>lt;sup>86</sup> See Virginia Cellular Order, FCC 03-338, at paras. 33-35.

<sup>87</sup> See Virginia Cellular Order, FCC 03-338, at para. 1-2.

<sup>88</sup> See Virginia Cellular Order, FCC 03-338, at para. n. 3.

<sup>89</sup> See Virginia Cellular Order, FCC 03-338, at para. 29.

<sup>90</sup> See Virginia Cellular Order, FCC 03-338, at para. 35.

<sup>&</sup>lt;sup>91</sup> Verizon argues that allowing ETCs, such as Highland Cellular, "to receive high cost support by serving only the lowest cost customers would waste universal service funds, increasing the burden on those who contribute to the universal service program, and potentially taking funds away from places where the funding is more needed." Verizon Comments at 7.

<sup>92</sup> See Virginia Cellular Order, FCC 03-338, at para. 35.

lowest-cost, wire centers in Verizon South's study area. <sup>93</sup> The population in these four wire centers represents approximately 42,128 customers. In contrast, the remaining approximately six percent of Highland Cellular's potential customers in Verizon South's study area, which are located in the two lowest-density, highest-cost wire centers, represent only approximately 2,800 customers. <sup>94</sup>

32. As we discussed in the *Virginia Cellular Order*, when a competitor serves only the lowest-cost, highest-density wire centers in a study area with widely disparate population densities, the incumbent may be placed at a sizeable unfair disadvantage. <sup>95</sup> Universal service support is calculated on a study-area-wide basis. Although Verizon South did not take advantage of the Commission's disaggregation options to protect against possible uneconomic entry in its lower cost area, <sup>96</sup> we find on the facts here that designating Highland Cellular as an ETC in these requested wire centers potentially could undermine Verizon South's ability to serve its entire study area. Specifically, because Verizon South's study area includes wire centers with highly variable population densities, and therefore highly variable cost characteristics, disaggregation may be a less viable alternative for reducing creamskimming opportunities. <sup>97</sup> This problem may be compounded where the cost characteristics of the incumbent and competitor differ substantially. <sup>98</sup> We therefore reject arguments that incumbents can, in every instance, protect

<sup>&</sup>lt;sup>93</sup> The four highest-density areas that Highland Cellular proposes to serve are the Tazewell wire center (98 persons per square mile), the Pocahontas wire center (100 persons per square mile), the Bluefield wire center (101 persons per square mile), and the Richlands wire center (143 persons per square mile). See Highland Cellular January 14 Supplement.

<sup>&</sup>lt;sup>94</sup> The Rocky Gap wire center has a population density of 18 persons per square mile and the Jewell Ridge wire center has a population density of 22 persons per square mile.

<sup>95</sup> See Virginia Cellular Order, FCC 03-338, at para. 35.

<sup>&</sup>lt;sup>96</sup> In the Rural Task Force Order, the Commission provided incumbent LECs with certain options for disaggregating their study areas, determining that universal service support should be disaggregated and targeted below the study area level to eliminate uneconomic incentives for competitive entry caused by the averaging of support across all lines served by a carrier within its study area. Under disaggregation and targeting, per-line support is more closely associated with the cost of providing service. There are fewer issues regarding inequitable universal service support and concerns regarding the incumbent's ability to serve its entire study area when there is in place a disaggregation plan for which the per-line support available to a competitive ETC in the wire centers located in "low-cost" zones is less than the amount a competitive ETC could receive if it served in one of the wire centers located in the "highcost" zones. See Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulema king in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, 16 FCC Rcd 11244, para. 145 (2001) (Rural Task Force Order), as corrected by Errata, CC Docket Nos. 96-45, 00-256 (Acc. Pol. Div. rel. Jun. 1, 2001), recon. pending. Although the deadline (May 15, 2002) for carriers to file disaggregation plans has passed, the relevant state commission or appropriate regulatory authority may nonetheless require a carrier to disaggregate, either on its own motion or that of an interested party. See USAC's website, http://www.universalservice.org/hc/disaggregation. See also Rural Task Force Order, 16 FCC Rcd at 11303, para.

<sup>&</sup>lt;sup>97</sup> The population densities of the requested Verizon South wire centers are: Rocky Gap (18 persons per square), Jewell Ridge (22 persons per square mile), Tazewell (98 persons per square mile), Pocahontas (100 persons per square mile), Bluefield (101 persons per square mile), and Richlands (143 persons per square mile). We note that these figures do not take into account cost variability within specific wire centers, which may be particularly acute in rural areas.

<sup>&</sup>lt;sup>98</sup> See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Montana Universal Service Task Force's Reply Comments, filed June 3, 2003, at 8; Federal-State Joint Board on Universal Service, CC Docket No.

against creamskimming by disaggregating high-cost support to the higher-cost portions of the incumbent's study area. 99

Finally, we conclude that designating Highland Cellular as an ETC in a portion of United Telephone's Saltville wire center would not serve the public interest. Although the Wireline Competition Bureau previously designated an ETC for portions of a rural telephone company's wire center, 100 we conclude that making designations for a portion of a rural telephone company's wire center would be inconsistent with the public interest. In particular, we conclude, that prior to designating an additional ETC in a rural telephone company's service area, the competitor must commit to provide the supported services to customers throughout a minimum geographic area. A rural telephone company's wire center is an appropriate minimum geographic area for ETC designation because rural carrier wire centers typically correspond with county and/or town lines. We believe that requiring a competitive ETC to serve entire communities will make it less likely that the competitor will relinquish its ETC designation at a later date. Because consumers in rural areas tend to have fewer competitive alternatives than consumers in urban areas, such consumers are more vulnerable to carriers relinquishing ETC designation. 101 Highland Cellular has stated that, should the Commission impose a requirement that competitive ETCs serve complete rural telephone company wire centers, it would not seek designation in the Saltville wire center. 102 We, therefore, do not designate Highland Cellular as an ETC in the Saltville wire center.

## D. Designated Service Area

34. Highland Cellular is designated an ETC in the requested areas served by the non-rural telephone company, Verizon Virginia, as listed in Appendix A. We designate Highland Cellular as an ETC throughout most of its CMRS licensed service area in the Virginia 2 Rural Service Area. Highland Cellular is designated as an ETC in the area served by the rural telephone company, Burkes Garden, whose study area Highland Cellular is able to serve completely, as listed in Appendix B. Subject to the Virginia Commission's agreement on redefining the service area of United Telephone, we also designate Highland Cellular as an ETC for the entire Bland and Ceres wire centers as listed in Appendix C. Inally, we do not designate Highland Cellular as an ETC in the study area served by Verizon South or the Saltville

<sup>(...</sup>continued from previous page)

<sup>96-45,</sup> Organization for the Advancement and Promotion of Small Telephone Companies' Reply Comments, filed June 3, 2003, at 5.

<sup>99</sup> See Highland Cellular Reply Comments at 7-8.

<sup>100</sup> RCC Holdings ETC Designation Order, 17 FCC Rcd at paras. 34-35, 37.

<sup>&</sup>lt;sup>101</sup> See In the Matter of 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, WT Docket No. 01-14, Report and Order, 16 FCC Rcd 22668, 22684-85, para. 34 (2001).

<sup>&</sup>lt;sup>102</sup> See Highland Cellular December 12 Supplement at 4. In contrast, Virginia Cellular amended its petition for ETC designation in the Commonwealth of Virginia to cover the entirety of the Williamsville, Virginia wire center, although its CMRS licensed service area in Virginia only covered a portion of that wire center. See Virginia Cellular Order, FCC 03-338, at para. 37.

<sup>103</sup> Highland Cellular Petition at 1.

<sup>104</sup> See Appendix B.

<sup>&</sup>lt;sup>105</sup> See Appendix C.

wire center served by United Telephone.

- 35. We designate Highland Cellular as an ETC in the Bland and Ceres wire centers in the study area of United Telephone. We find that because the Bland and Ceres wire centers are low-density, high-cost wire centers, concerns about undermining United Telephone's ability to serve the entire study area are minimized. Accordingly, we find that denying Highland Cellular ETC status for United Telephone's Bland and Ceres wire centers simply because Highland Cellular is not licensed to serve the twenty-five remaining wire centers would be inappropriate. Consequently, we conclude that it is in the public interest to designate Highland Cellular as an ETC in United Telephone's Bland and Ceres wire centers and include those wire centers in Highland Cellular's service area, as redefined below.
- 36. Finally, for the reasons described above, the service area we designate for Highland Cellular does not contain any portion of Verizon South's study area or United Telephone's Saltville wire center. 107

# E. Redefining Rural Company Service Areas

- 37. We redefine the service area of United Telephone pursuant to section 214(e)(5). Consistent with prior rural service area redefinitions, we redefine each wire center in the United Telephone study area as a separate service area. Our decision to redefine the service area of United Telephone is subject to the review and final agreement of the Virginia Commission in accordance with applicable Virginia Commission requirements. Accordingly, we submit our redefinition proposal to the Virginia Commission and request that it examine such proposal based on its unique familiarity with the rural areas in question.
- 38. In order to designate Highland Cellular as an ETC in a service area that is different from the affected rural telephone company study area, we must redefine the service areas of the rural telephone company in accordance with section 214(e)(5) of the Act. We redefine the affected service area only to determine the portions of the rural service area in which to designate Highland Cellular and future competitive carriers seeking ETC designation in the same rural service area. In defining United Telephone's service area to be different than its

<sup>106</sup> We note that the study area of United Telephone is composed of a contiguous block of twenty-eight wire centers which include the Abingdon, Austinville, Bland, Bristol, Cana, Ceres, Chilhowie, Comers Rock-Elk Creek, Cripple Creek, Damascus, Fries, Galax, Glade Spring, Gate City, Hillsville, Independence, Konnarock, Laurel Fork, Marion-Atkins, Meadowview, Mouth of Wilson, Max Meadows, Rich Valley, Rural Retreat, Saltville, Sugar Grove, Sylvatus, and Wytheville wire centers. See Highland Cellular Amendment I at Exhibit F; Highland Cellular Amendment II at 1-2. Within this contiguous block, the Bland wire center, Ceres wire center, and a portion of the Saltville wire center fall within Highland Cellular's licensed service area, and the remaining twenty-five wire centers fall outside Highland Cellular's licensed service area. Highland Cellular Amendment II at 2.

<sup>107</sup> See supra paras. 29-33.

<sup>&</sup>lt;sup>108</sup> See RCC Holdings ETC Designation Order, 17 FCC Rcd at 23547, para. 37. See also Highland Cellular Amendment II at 2. Highland Cellular initially requested that that the Commission designate United Telephone's Bland, Ceres, and Saltville wire centers as one individual service area. See Highland Cellular Petition at 12. Highland Cellular subsequently amended its petition to request that each wire center be defined as separate service areas. See Highland Cellular Amendment II at 2.

<sup>109</sup> See 47 U.S.C. § 214(e)(5).

<sup>110</sup> See 47 U.S.C. § 214(e)(2), (6).

study area, we are required to act in concert with the relevant state commission, "taking into account the recommendations" of the Joint Board. The Joint Board's concerns regarding rural telephone company service areas as discussed in the 1996 Recommended Decision are as follows: (1) minimizing creamskimming; (2) recognizing that the Act places rural telephone companies on a different competitive footing from other LECs; and (3) recognizing the administrative burden of requiring rural telephone companies to calculate costs at something other than a study area level. We find that the proposed redefinition properly addresses these concerns.

- 39. First, we conclude that redefining United Telephone's service area at the wire center level should not result in opportunities for creamskimming. We have analyzed the population densities of the wire centers in United Telephone's study area where Highland Cellular will and will not receive support and conclude that this redefinition does not raise creamskimming concerns. We note that we do not propose redefinition in areas where ETC designation would potentially undermine the incumbent's ability to serve its entire study area. Therefore, we conclude, based on the particular facts of this case, that there is little likelihood of rural creamskimming effects in redefining the service area of United Telephone.
- 40. Second, our decision to redefine the service area includes special consideration for the affected rural carrier. We find no evidence that the proposed redefinition will harm United Telephone. Although no parties have opposed the specific redefinition of United Telephone's service area, Verizon has raised general concerns that the designation of Highland Cellular as a competitive ETC will result in inefficient investment or will strain the universal service fund. We find no evidence that the proposed redefinition will harm United Telephone. We note that redefining the service area of the affected rural telephone company will not change the amount of universal service support that is available to the incumbents.
- 41. Third, we find that redefining United Telephone's service area as proposed will not require United Telephone to determine its costs on any basis other than the study area level. Rather, the redefinition merely enables competitive ETCs to serve areas that are smaller than the entire ILEC study area. Our decision to redefine the service area does not modify the existing rules applicable to rural telephone companies for calculating costs on a study area basis, nor, as a practical matter, the manner in which United Telephone will comply with these rules. Therefore, we find that the concern of the Joint Board that redefining rural service areas might impose additional administrative burdens on affected rural telephone companies is not at issue here.
- 42. In accordance with section 54.207(d) of the Commission's rules, we submit this Order to the Virginia Commission, 116 and request that the Virginia Commission treat this Order as a petition to redefine a service area under section 54.207(d)(1) of the Commission's rules. Highland Cellular's ETC designation in the service area of United Telephone is subject to the

<sup>&</sup>lt;sup>111</sup> See 47 U.S.C. § 214(e)(5).

<sup>112</sup> See 1996 Recommended Decision, 12 FCC Rcd at 179-80, paras. 172-74.

<sup>&</sup>lt;sup>113</sup> See supra paras. 26-28.

<sup>114</sup> See Verizon Comments at 3-5.

<sup>115</sup> See supra para. 25.

<sup>116 47</sup> C.F.R. § 54.207(d).

Virginia Commission's review and agreement with the redefinition proposal herein. <sup>117</sup> We find that the Virginia Commission is uniquely qualified to examine the proposed redefinition because of its familiarity with the rural service area in question. Upon the effective date of the agreement of the Virginia Commission with our redefinition of the service area of United Telephone, our designation of Highland Cellular as an ETC in the area served by United Telephone as set forth herein, shall also take effect. In all other areas for which this Order grants ETC status to Highland Cellular, as described herein, such designation is effective immediately. If, after its review, the Virginia Commission determines that it does not agree with the redefinition proposal herein, we will reexamine Highland Cellular's petition with regard to redefining United Telephone's service area.

## F. Regulatory Oversight

43. We note that Highland Cellular is obligated under section 254(e) of the Act to use high-cost support "only for the provision, maintenance, and upgrading of facilities and services for which support is intended" and is required under sections 54.313 and 54.314 of the Commission's rules to certify annually that it is in compliance with this requirement. Separate and in addition to its annual certification filing under sections 54.313 and 54.314 of our rules, Highland Cellular has committed to submit records and documentation on an annual basis detailing its progress towards meeting its build-out plans. Highland Cellular also has committed to become a signatory to the Cellular Telecommunications Industry Association's Consumer Code for Wireless Service and provide the number of consumer complaints per 1,000 mobile handsets on an annual basis. In addition, Highland Cellular will annually submit information detailing how many requests for service from potential customers were unfulfilled for the past year. We require Highland Cellular to submit these additional data to the Commission and USAC on October 1 of each year beginning October 1, 2004. Ye find that reliance on Highland Cellular's commitments is reasonable and consistent with the public interest and the Act and the Fifth Circuit decision in Texas Office of Public Utility Counsel v. FCC.

by the need for the federal-state coordination on redefining rural service areas. See Universal Service Order, 12 FCC Rcd at 8880-1, para. 187. Therefore, the Commission adopted section 54.207 of the Commission's rules by which the state commissions may obtain agreement of the Commission when proposing to redefine a rural service area. Id. at 8881. Similarly, the Commission adopted a procedure in section 54.207 to address the occasions when the Commission seeks to redefine a rural service area. Id. at 8881, para. 188. The Commission stated that "in keeping with our intent to use this procedure to minimize administrative delay, we intend to complete consideration of any proposed definition of a service area promptly." Id.

<sup>118 47</sup> U.S.C. § 254(e); 47 C.F.R. §§ 54.313, 54.314.

<sup>119</sup> See supra para 24; Highland Cellular November 19 Supplement, at 2.

<sup>120</sup> See supra para. 16; at 4, Highland Cellular November 19 Supplement at 4, n.7.

<sup>&</sup>lt;sup>121</sup> Highland Cellular's additional submissions concerning consumer complaints per 1,000 handsets and unfulfilled service requests will include data from July 1 of the previous calendar year through June 30 of the reporting calendar year.

<sup>122</sup> Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393, 417-18 (5<sup>th</sup> Cir. 1999) In TOPUC v. FCC, the Fifth Circuit held that nothing in section 214(e)(2) of the Act prohibits states from imposing additional eligibility conditions on ETCs as part of their designation process. See id. Consistent with this holding, we find that nothing in section 214(e)(6) prohibits the Commission from imposing additional conditions on ETCs when such designations fall under our jurisdiction.

conclude that fulfillment of these additional reporting requirements will further the Commission's goal of ensuring Highland Cellular satisfies its obligation under section 214(e) of the Act to provide supported services throughout its designated service area. We note that the Commission may institute an inquiry on its own motion to examine any ETC's records and documentation to ensure that the high-cost support it receives is being used "only for the provision, maintenance, and upgrading of facilities and services" in the areas where it is designated as an ETC. <sup>123</sup> Highland Cellular will be required to provide such records and documentation to the Commission and USAC upon request. We further emphasize that if Highland Cellular fails to fulfill the requirements of the statute, our rules and the terms of this Order after it begins receiving universal service support, the Commission has authority to revoke its ETC designation. <sup>124</sup> The Commission also may assess forfeitures for violations of Commission rules and orders. <sup>125</sup>

#### IV. ANTI-DRUG ABUSE ACT CERTIFICATION

44. Pursuant to section 5301 of the Anti-Drug Abuse Act of 1988, no applicant is eligible for any new, modified, or renewed instrument of authorization from the Commission, including authorizations issued pursuant to section 214 of the Act, unless the applicant certifies that neither it, nor any party to its application, is subject to a denial of federal benefits, including Commission benefits. Highland Cellular has provided a certification consistent with the requirements of the Anti-Drug Abuse Act of 1988. Ye find that Highland Cellular has satisfied the requirements of the Anti-Drug Abuse Act of 1988, as codified in sections 1.2001-1.2003 of the Commission's rules.

## V. ORDERING CLAUSES

- 45. Accordingly, IT IS ORDERED that, pursuant to the authority contained in section 214(e)(6) of the Communications Act, 47 U.S.C. § 214(e)(6), Highland Cellular, Inc. IS DESIGNATED AN ELIGIBLE TELECOMMUNICATIONS CARRIER for portions of its licensed service area in the Commonwealth of Virginia to the extent described herein.
- 46. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 214(e)(5) of the Communications Act, 47 U.S.C. § 214(e)(5), and sections 54.207(d) and (e) of the Commission's rules, 47 C.F.R. §§ 54.207(d) and (e), the request of Highland Cellular, Inc. to redefine the service area of United Telephone Company Southeast Virginia in Virginia to IS. GRANTED to the extent described herein and SUBJECT TO the agreement of the Virginia State Corporation Commission with the Commission's redefinition of the service area. For United Telephone Company Southeast Virginia, upon the effective date of the agreement of the Virginia State Corporation Commission with the Commission's redefinition of such service area, this designation of Highland Cellular, Inc. as an ETC for such area as set forth herein shall also take effect.

<sup>&</sup>lt;sup>123</sup> 47 U.S.C. §§ 220, 403; 47 C.F.R. § 54.313, 54.314.

<sup>124</sup> See Declaratory Ruling, 15 FCC Rcd at 15174, para. 15. See also 47 U.S.C. § 254(e).

<sup>125</sup> See 47 U.S.C. § 503(b).

<sup>&</sup>lt;sup>126</sup> 47 U.S.C. § 1.2002(a); 21 U.S.C. § 862.

<sup>127</sup> See Highland Cellular Petition at 19.

- 47. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 214(e)(5) of the Communications Act, 47 U.S.C. § 214(e)(5), and sections 54.207(d) and (e) of the Commission's rules, 47 C.F.R. §§ 54.207(d) and (e), the request of Highland Cellular, Inc. to redefine the service area of Verizon South, Inc. Virginia in Virginia IS DENIED.
- 48. IT IS FURTHER ORDERED that a copy of this Memorandum Opinion and Order SHALL BE transmitted by the Office of the Secretary to the Virginia State Corporation Commission and the Universal Service Administrative Company.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch Secretary

### APPENDIX A

# VIRGINIA NON-RURAL TELEPHONE COMPANY WIRE CENTERS FOR INCLUSION IN HIGHLAND CELLULAR'S ETC SERVICE AREA

Verizon Virginia Inc.

Honaker (wire center code HNKRVAHK)

### APPENDIX B

# VIRGINIA RURAL TELEPHONE COMPANY STUDY AREAS FOR INCLUSION IN HIGHLAND CELLULAR'S ETC SERVICE AREA

Burkes Garden Telephone Company, Inc. (study area code 190220)

#### APPENDIX C

# VIRGINIA RURAL TELEPHONE COMPANY WIRE CENTERS FOR INCLUSION IN HIGHLAND CELLULAR'S ETC SERVICE AREA

### United Telephone Company - Southeast Virginia

Bland (wire center code BLNDVAXA)

Ceres (wire center code CERSVAXA)

# STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: Federal-State Joint Board on Universal Service; Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia

The long-term viability of universal service depends on a more rigorous review process for ETC applications. Today's decision, like the decision in *Virginia Cellular* that preceded it, represents a step in the right direction. During the coming year, as we consider the Joint Board's guidance, we need to seize the opportunity to improve it further. We must give serious consideration to the consequences that flow from using the fund to support several competitors in truly remote areas. We also need to bear in mind that when we do fund competition, our rules must provide the right level of support.

I look forward to this important dialogue at the Commission. To keep the country well-connected, we must ensure that all Americans enjoy comparable services at comparable rates.

#### DISSENTING STATEMENT OF COMMISSIONER KEVIN J. MARTIN

Re: Federal-State Joint Board on Universal Service; Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier In the Commonwealth of Virginia

Today's decision designates Highland Cellular, Inc. (Highland Cellular) as an eligible telecommunications carrier (ETC) in areas served by two rural telephone companies and one non-rural telephone company in the Commonwealth of Virginia. The Commission finds the designation of Highland Cellular as an ETC to be in the public interest and furthers the goals of universal service by providing greater mobility and a choice of providers in high-cost and rural areas of Virginia. I object to this Order's finding that the goals of universal service are to provide greater mobility and a choice of providers in rural areas. Rather, I believe the main goals of the universal service program are to ensure that all consumers—including those in high cost areas have access at affordable rates.

During the past two years, I have continued to express my concerns with the Commission's policy of using universal service support as a means of creating "competition" in high cost areas. As I have stated previously, I am hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. The Commission's policy may make it difficult for any one carrier to achieve the economies of scale necessary to serve all of the customers in rural areas.

I am troubled by today's decision because we fail to require ETCs to provide the same type and quality of services throughout the same geographic service area as a condition of receiving universal service support. In my view, competitive ETCs seeking universal service support should have the same "carrier of last resort" obligations as incumbent service providers in order to receive universal service support. Adopting the same "carrier of last resort" obligation for all ETCs is fully consistent with the Commission's existing policy of competitive and technological neutrality amongst service providers.

Today's decision also fails to require CETCs to provide equal access. Equal access provides a direct, tangible consumer benefit that allows individuals to decide which long distance plan, if any, is most appropriate for their needs. As I have stated previously, I believe an equal access requirement would allow ETCs to continue to offer bundled local and long distance service packages, while also empowering consumers with the ability to choose the best calling plan for their needs.<sup>2</sup>

<sup>&</sup>lt;sup>1</sup> Separate Statement of Commissioner Kevin J. Martin, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket (No. 00-256)(rel. October, 11, 2002).

<sup>&</sup>lt;sup>2</sup> Separate Statement of Commissioner Kevin J. Martin, Federal-State Joint Board on Universal Service, CC Docket No.96-45, (rel. July 10, 2002); Separate Statement of Commissioner Kevin J. Martin, Federal-State Joint Board on Universal Service, FCC 03-170, CC Docket No. 96-45, (rel. July 14, 2003).

The Commission also redefines the service area of United Telephone where Highland Cellular's proposed service area does not cover the entire service area of the incumbent rural telephone company. I am concerned with the redefining of service areas of incumbent rural telephone companies. I am also concerned that the Commission did not sufficiently consider the cost data to verify whether or not Highland Cellular is serving only low-cost, high revenue customers in the rural telephone company's area.

Finally, I remain concerned that the Commission's recent decisions on pending CETC applications may prejudge the Commission's upcoming decision regarding the framework for high-cost universal service support. These decisions now provide a template for approving the numerous CETC applications currently pending at the Commission, and I believe may ultimately push the Commission to take more aggressive steps to slow the growth of the universal service fund such as primary line restrictions and caps on the amount of universal service support available for service providers in rural America.

# SEPARATE STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN

Re: Federal-State Joint Board on Universal Service; Highland Cellular, Inc., Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia

Late last year, I had the opportunity to further outline my thoughts on the Commission's eligible telecommunications carrier (ETC) designation process and the role of the public interest in that process. <sup>1</sup> For the reasons discussed then, I support this Order responding to the petition of Highland Cellular to be designated as an ETC in the Commonwealth of Virginia. This Order, along with the recently released *Virginia Cellular Order*, <sup>2</sup> marks a significant improvement from past Commission decisions by more fully embracing the statutory public interest mandate.

Through these orders, we have provided a more stringent examination of the public interest and acknowledged that competition alone cannot satisfy the public interest analysis. Instead, we have weighed a variety of factors to assess the overall benefits and costs. We considered whether the applicant has made a commitment to service quality and will provide essential services in its community. We have also improved the accountability of the process by requiring ETCs to submit regularly documentation detailing their progress towards meeting their build-out plans and other commitments.

On February 27, 2004, after adoption of this *Highland Cellular Order*, the Federal-State Joint Board on Universal Service (Joint Board) released a Recommended Decision that further clarifies and strengthens the standards for designating ETCs and for assessing the public interest. I was pleased that the Joint Board recognized that establishing a meaningful public interest test and providing meaningful guidance on ETC designations will help limit federal universal service funding to those providers who are committed to serving rural communities. I have been pleased to hear reports that state commissions and other parties are using the new *Virginia Cellular Order* template in many state ETC proceedings. I am also encouraging the FCC and state commissions to embrace the Joint Board's approach as soon as possible.

Establishing a more meaningful public interest test is a critical first step in a larger effort to manage responsibly the growth of the universal service fund overall. I believe there are constructive actions we can take to make sure our universal service mandate is upheld while still ensuring that the fund does not grow dramatically. First, reforming the process for designating ETCs is essential. Second, funding new entrants based on their own costs, rather than the costs of the incumbent, would more correctly align our rules with the statutory requirement that funds be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. And third, the Commission should explore frameworks to identify those

<sup>&</sup>lt;sup>1</sup> Commissioner Jonathan S. Adelstein, *Accessing the Public Interest: Keeping America Well-Connected*, Address Before the 21st Annual Institute on Telecommunications Policy & Regulation (Dec. 4, 2003) (<a href="http://www.fcc.gov/commissioners/adelstein/speeches2003.html">http://www.fcc.gov/commissioners/adelstein/speeches2003.html</a>).

<sup>&</sup>lt;sup>2</sup> Federal-State Joint Board on Universal Service; Virginia Cellular, LLC., Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, CC Docket No. 96-45, FCC 03-338 (rel. Jan. 22, 2004) (Virginia Cellular Order).

very high-cost areas where it may be prohibitive to fund more than one ETC. These three key reforms, if carried out together, would measurably reduce fund growth without shortchanging Rural America.

# Before the Federal Communications Commission Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	
Universal Service	)	CC Docket No. 96-45
	)	
Virginia Cellular, LLC	)	
Petition for Designation as an	)	
Eligible Telecommunications Carrier	)	
In the Commonwealth of Virginia	)	

#### MEMORANDUM OPINION AND ORDER

Adopted: December 31, 2003 Released: January 22, 2004

By the Commission: Chairman Powell, Commissioners Abernathy, Copps, and Adelstein issuing separate statements; Commissioner Martin dissenting and issuing a separate statement.

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APPENDIX A -- VIRGINIA NON-RURAL WIRE CENTERS FOR INCLUSION IN VIRGINIA CELLULAR'S ETC SERVICE AREA

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APPENDIX C -- VIRGINIA RURAL TELEPHONE COMPANY WIRE CENTERS FOR INCLUSION IN VIRGINIA CELLULAR'S ETC SERVICE AREA

#### I. INTRODUCTION

- 1. In this Order, we grant in part and deny in part, subject to enumerated conditions, the petition of Virginia Cellular, LLC (Virginia Cellular) to be designated as an eligible telecommunications carrier (ETC) throughout its licensed service area in the Commonwealth of Virginia pursuant to section 214(e)(6) of the Communications Act of 1934, as amended (the Act). In so doing, we conclude that Virginia Cellular, a commercial mobile radio service (CMRS) carrier, has satisfied the statutory eligibility requirements of section 214(e)(1). Specifically, we conclude that Virginia Cellular has demonstrated that it will offer and advertise the services supported by the federal universal service support mechanisms throughout the designated service area. We find that the designation of Virginia Cellular as an ETC in two non-rural study areas serves the public interest. We also find that the designation of Virginia Cellular as an ETC in areas served by five of the six rural telephone companies serves the public interest and furthers the goals of universal service. As explained below, with regard to the study area of NTELOS, we do not find that ETC designation would be in the public interest.
- 2. Because Virginia Cellular is licensed to serve only part of the study area of three of six incumbent rural telephone companies affected by this designation, Virginia Cellular has requested that the Commission redefine the service area of each of these rural telephone companies for ETC designation purposes, in accordance with section 214(e)(5) of the Act. We agree to the service area redefinition proposed by Virginia Cellular for the service areas of Shenandoah and MGW, subject to the agreement of the Virginia State Corporation Commission (Virginia Commission) in accordance with applicable Virginia Commission requirements. We find that the Virginia Commission's first-hand knowledge of the rural areas in question uniquely qualifies it to examine the redefinition proposal and determine whether it should be approved.

<sup>&</sup>lt;sup>1</sup> Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the State of Virginia, filed April 26, 2002 (Virginia Cellular Petition).

<sup>&</sup>lt;sup>2</sup> 47 U.S.C. § 214(e)(1).

<sup>&</sup>lt;sup>3</sup> Virginia Cellular requests ETC designation in the study areas of the following non-rural telephone companies: Bell Atlantic and GTE South, Inc. (GTE). Virginia Cellular requests ETC designation in the study areas of the following rural telephone companies: Shenandoah Telephone Company (Shenandoah), NTELOS Telephone Inc. (NTELOS, formerly Clifton Forge-Waynesboro Telephone Company), MGW Telephone Company (MGW, formerly Mountain Grove-Williamsville Telephone Company), New Hope Telephone Company (New Hope), North River Telephone Cooperative (North River), and Highland Telephone Cooperative (Highland). We note that although the Virginia Cellular Petition requested ETC designation for the study area served by Central Telephone Company of Virginia, Virginia Cellular subsequently withdrew its request for ETC designation in Central Telephone's study area. See Supplement to Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the State of Virginia, filed April 17, 2003 at 1 (Virginia Cellular April 17, 2003 Supplement).

<sup>&</sup>lt;sup>4</sup> Virginia Cellular asked the Commission to redefine the service areas of Shenandoah, NTELOS, and MGW. See Virginia Cellular Petition at 11-12 and Virginia Cellular Reply Comments at 7. See also Virginia Cellular Amendment to Petition for Designation as an Eligible Telecommunications Carrier, filed October 21, 2002, at 2 (Virginia Cellular Amendment).

<sup>&</sup>lt;sup>5</sup> As discussed below, at this time, we do not designate Virginia Cellular as an ETC in the study area of NTELOS. See infra paras. 35, 39. Accordingly, we do not find it necessary to redefine the service area of NTELOS.

<sup>&</sup>lt;sup>6</sup> If the Virginia Commission does not agree to our redefinition of the affected rural service areas, we will reexamine our decision with regard to redefining these rural service areas.

Because we do not designate Virginia Cellular as an ETC in NTELOS' study area, we do not redefine this service area.

- 3. In response to a request from the Commission, the Federal-State Joint Board on Universal Service (Joint Board) is currently reviewing: (1) the Commission's rules relating to the calculation of high-cost universal service support in areas where a competitive ETC is providing service; (2) the Commission's rules regarding support for non-primary lines; and (3) the process for designating ETCs. Some commenters in that proceeding have raised concerns about the rapid growth of high-cost universal service support and the impact of such growth on consumers in rural areas. The outcome of that proceeding could potentially impact, among other things, the support that Virginia Cellular and other competitive ETCs may receive in the future and the criteria used for continued eligibility to receive universal service support.
- 4. While we await a recommended decision from the Joint Board, we acknowledge the need for a more stringent public interest analysis for ETC designations in rural telephone company service areas. The framework enunciated in this Order shall apply to all ETC designations for rural areas pending further action by the Commission. We conclude that the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas. Instead, in determining whether designation of a competitive ETC in a rural telephone company's service area is in the public interest, we weigh numerous factors, including the benefits of increased competitive choice, the impact of multiple designations on the universal service fund, the unique advantages and disadvantages of the competitor's service offering, any commitments made regarding quality of telephone service provided by competing providers, and the competitive ETC's ability to provide the supported services throughout the designated service area within a reasonable time frame. Further, in this Order, we impose as ongoing conditions the commitments Virginia Cellular has made on the record in this proceeding.<sup>9</sup> conditions will ensure that Virginia Cellular satisfies its obligations under section 214 of the Act. We conclude that these steps are appropriate in light of the increased frequency of petitions for competitive ETC designations and the potential impact of such designations on consumers in rural areas.

#### II. BACKGROUND

#### A. The Act

5. Section 254(e) of the Act provides that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support." Pursuant to section 214(e)(1), a common carrier designated as an ETC must offer

<sup>&</sup>lt;sup>7</sup> See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Order, FCC 02-307 (rel. Nov. 8, 2002) (Referral Order); Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission's Rules Relating to High Cost Universal Service Support and the ETC Process, CC Docket 96-45, 18 FCC Rcd 1941, Public Notice (rel. Feb. 7, 2003) (Portability Public Notice).

<sup>&</sup>lt;sup>8</sup> See generally, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, United States Telecom Association's Comments, filed May 5, 2003; Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Verizon's Comments, filed May 5, 2003.

<sup>&</sup>lt;sup>9</sup> See infra para. 46.

<sup>10 47</sup> U.S.C. § 254(e).

and advertise the services supported by the federal universal service mechanisms throughout the designated service area.<sup>11</sup>

6. Section 214(e)(2) of the Act gives state commissions the primary responsibility for performing ETC designations. Section 214(e)(6), however, directs the Commission, upon request, to designate as an ETC accommon carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission. Under section 214(e)(6), the Commission may, with respect to an area served by a rural telephone company, and shall, in all other areas, designate more than one common carrier as an ETC for a designated service area, consistent with the public interest, convenience, and necessity, so long as the requesting carrier meets the requirements of section 214(e)(1). Before designating an additional ETC for an area served by a rural telephone company, the Commission must determine that the designation is in the public interest.

# B. Commission Requirements for ETC Designation and Redefining the Service Area

7. Filing Requirements for ETC Designation. An ETC petition must contain the following: (1) a certification and brief statement of supporting facts demonstrating that the petitioner is not subject to the jurisdiction of a state commission; (2) a certification that the petitioner offers or intends to offer all services designated for support by the Commission pursuant to section 254(c); (3) a certification that the petitioner offers or intends to offer the supported services "either using its own facilities or a combination of its own facilities and resale of another carrier's services;" (4) a description of how the petitioner "advertise[s] the availability of [supported] services and the charges therefor using media of general distribution;" and (5) if the petitioner is not a rural telephone company, a detailed description of the geographic service area for which it requests an ETC designation from the Commission. 16

<sup>11 47</sup> U.S.C. § 214(e)(1).

<sup>&</sup>lt;sup>12</sup> 47 U.S.C. § 214(e)(2). See also Federal-State Joint Board on Universal Service, Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12255, para. 93 (2000) (Twelfth Report and Order).

<sup>13 47</sup> U.S.C. § 214(e)(6). See, e.g., Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota, CC Docket No. 96-45, Memorandum Opinion and Order, 16 FCC Rcd 18133 (2001) (Western Wireless Pine Ridge Order); Pine Belt Cellular, Inc. and Pine Belt PCS, Inc., Petition for Designation as an Eligible Telecommunications Carrier, CC Docket No. 96-45, Memorandum Opinion and Order, 17 FCC Rcd 9589 (Wireline Comp. Bur. 2002); Corr Wireless Communications, LLC Petition for Designation as an Eligible Telecommunications Carrier, CC Docket 96-45, Memorandum Opinion and Order, 17 FCC Rcd 21435 (Wireline Comp. Bur. 2002). We note that the Wireline Competition Bureau has delegated authority to perform ETC designations. See Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, Public Notice, 12 FCC Rcd 22947, 22948 (1997) (Section 214(e)(6) Public Notice). The Wireline Competition Bureau was previously named the Common Carrier Bureau.

<sup>14 47</sup> U.S.C. § 214(e)(6).

<sup>15</sup> Id.

<sup>&</sup>lt;sup>16</sup> Section 214(e)(6) Public Notice, 12 FCC Rcd at 22948-49. See also Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities

- 8. <u>Twelfth Report and Order</u>. On June 30, 2002, the Commission released the *Twelfth Report and Order* which, among other things, sets forth how a carrier seeking ETC designation from the Commission must demonstrate that the state commission lacks jurisdiction to perform the ETC designation. Carriers seeking designation as an ETC for service provided on nontribal lands must provide the Commission with an "affirmative statement" from the state commission or a court of competent jurisdiction that the carrier is not subject to the state commission's jurisdiction. The Commission defined an "affirmative statement" as "any duly authorized letter, comment, or state commission order indicating that [the state commission] lacks jurisdiction to perform the designation over a particular carrier." The requirement to provide an "affirmative statement" ensures that the state commission has had "a specific opportunity to address and resolve issues involving a state commission's authority under state law to regulate certain carriers or classes of carriers."
- 9. Redefining a Service Area. Under section 214(e)(5) of the Act, "[i]n the case of an area served by a rural telephone company, 'service area' means such company's 'study area' unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company."<sup>21</sup> Section 54.207(d) of the Commission's rules permits the Commission to initiate a proceeding to consider a definition of a service area that is different from a rural telephone company's study area as long as it seeks agreement on the new definition with the applicable state commission. 22 Under section 54.207(d)(1), the Commission must petition a state commission with the proposed definition according to that state commission's procedures.<sup>23</sup> In that petition, the Commission must provide its proposal for redefining the service area and its decision presenting reasons for adopting the new definition, including an analysis that takes into account the recommendations of the Federal-State Joint Board on Universal Service (Joint Board).<sup>24</sup> When the Joint Board recommended that the Commission retain the current study areas of rural telephone companies as the service areas for the rural telephone companies, the Joint Board made the following observations: (1) the potential for "cream skimming" is minimized by retaining study areas because competitors, as a condition of eligibility, must provide services throughout the rural telephone company's study area; (2) the Telecommunications Act of 1996 (1996 Act), in many respects, places rural telephone

Commission, Declaratory Ruling, CC Docket No. 96-45, 15 FCC Rcd 15168 (2000) (Declaratory Ruling), recon. pending.

<sup>&</sup>lt;sup>17</sup> See Twelfth Report and Order, 15 FCC Rcd at 12255-65, paras. 93-114.

<sup>&</sup>lt;sup>18</sup> Id. at 12255, para. 93.

<sup>19</sup> Id. at 12264, para. 113.

<sup>&</sup>lt;sup>20</sup> Id.

<sup>&</sup>lt;sup>21</sup> 47 U.S.C. § 214(e)(5).

<sup>&</sup>lt;sup>22</sup> See 47 C.F.R. § 54.207(d). Any proposed definition will not take effect until both the Commission and the state commission agree upon the new definition. See 47 C.F.R. § 54.207(d)(2).

<sup>&</sup>lt;sup>23</sup> See 47 C.F.R. § 54.207(d)(1).

<sup>&</sup>lt;sup>24</sup> See id. We note that the Wireline Competition Bureau has delegated authority to redefine service areas. 47 C.F.R. § 54.207(e).

companies on a different competitive footing from other local telephone companies; and (3) there would be an administrative burden imposed on rural telephone companies by requiring them to calculate costs at something other than a study area level.<sup>25</sup>

#### C. Virginia Cellular's Petition

- 10. On April 26, 2002, Virginia Cellular filed with this Commission a petition, pursuant to section 214(e)(6), seeking designation as an ETC throughout its licensed service area in the Commonwealth of Virginia. In its petition, Virginia Cellular contends that the Virginia Commission issued an "affirmative statement" that the Virginia Commission does not have jurisdiction to designate a CMRS carrier as an ETC. Accordingly, Virginia Cellular asks the Commission to exercise jurisdiction and designate Virginia Cellular as an ETC pursuant to section 214(e)(6). Virginia Cellular also maintains that it satisfies the statutory and regulatory prerequisites for ETC designation, and that designating Virginia Cellular as an ETC serves the public interest. 28
- 11. Virginia Cellular also requests the Commission to redefine the service areas of three rural telephone companies, Shenandoah, NTELOS, and MGW, because it is not permitted under its current license to provide facilities-based service to the entire study area of each of these companies. <sup>29</sup> Virginia Cellular states that as a wireless carrier, it is restricted to providing facilities-based service only in those areas where it is licensed by the Commission. <sup>30</sup> It adds that it is not picking and choosing the "lowest cost exchanges" of the affected rural telephone companies, but instead is basing its requested ETC area solely on its licensed service area and proposes to serve the entirety of that area. <sup>31</sup> Virginia Cellular contends that the proposed redefinition of the rural telephone companies' service areas is consistent with the recommendations regarding rural telephone company study areas set forth by the Joint Board in its *Recommended Decision*. <sup>32</sup>

<sup>&</sup>lt;sup>25</sup> See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Recommended Decision, 12 FCC Rcd 87, 179-80, paras. 172-74 (1996) (1996 Recommended Decision).

<sup>&</sup>lt;sup>26</sup> See generally, Virginia Cellular Petition. On May 15, 2002, the Wireline Competition Bureau released a Public Notice seeking comment on the Virginia Cellular Petition. See Wireline Competition Bureau Seeks Comment on Virginia Cellular LLC Petition for Designation as an Eligible Telecommunications Carrier in the State of Virginia, CC Docket No 96-45, Public Notice, 17 FCC Rcd 8778 (Wireline Comp. Bur. 2002); In the Matter of Federal-State Joint Board on Universal Service, CC Docket 96-45, Comments of Virginia Rural Telephone Companies, filed June 11, 2002 (Virginia Rural Telephone Companies Comments); In the Matter of Federal-State Joint Board on Universal Service, CC Docket 96-45, Reply Comments of the National Telecommunications Cooperative Association, filed June 17, 2002 (NTCA Comments).

<sup>&</sup>lt;sup>27</sup> Virginia Cellular Petition at 3-4.

<sup>&</sup>lt;sup>28</sup> Id. at 1-2, 4-9, 14-17.

<sup>&</sup>lt;sup>29</sup> *Id.* at 10-14. *See* Supplement to Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, filed October 11, 2002 at 1-2 (Virginia Cellular October 11 Supplement) and Virginia Cellular Amendment at 2.

<sup>&</sup>lt;sup>30</sup> Virginia Cellular Petition at 13.

<sup>31</sup> Id.

<sup>&</sup>lt;sup>32</sup> Id. at 12-14. See also 47 U.S.C. § 214(e)(5).

#### III. DISCUSSION

12. After careful review of the record before us, we find that Virginia Cellular has met all the requirements set forth in section 214(e)(1) and (e)(6) to be designated as an ETC by this Commission for portions of its licensed service area. First, we find that Virginia Cellular has demonstrated that the Virginia Commission lacks the jurisdiction to perform the designation and that the Commission therefore may consider Virginia Cellular's petition under section 214(e)(6). Second, we conclude that Virginia Cellular has demonstrated that it will offer and advertise the services supported by the federal universal service support mechanisms throughout the designated service area upon designation as an ETC in accordance with section 214(e)(1). In addition, we find that the designation of Virginia Cellular as an ETC in certain areas served by rural telephone companies serves the public interest and furthers the goals of universal service by providing greater mobility and a choice of service providers to consumers in high-cost and rural areas of Virginia. Pursuant to our authority under section 214(e)(6), we therefore designate Virginia Cellular as an ETC for parts of its licensed service area in the Commonwealth of Virginia, as set forth below. As explained below, however, we do not designate Virginia Cellular as an ETC in the study area of NTELOS.<sup>33</sup> In areas where Virginia Cellular's proposed service areas do not cover the entire study area of a rural telephone company, Virginia Cellular's ETC designation shall be subject to the Virginia Commission's agreement with our new definition for the rural telephone company service areas. In all other areas, as described herein. Virginia Cellular's ETC designation is effective immediately. Finally, we note that the outcome of the Commission's pending proceeding before the Joint Board examining the rules relating to high-cost universal service support in competitive areas could potentially impact the support that Virginia Cellular and other ETCs may receive in the future.<sup>34</sup> This Order is not intended to prejudge the outcome of that proceeding. We also note that Virginia Cellular always has the option of relinquishing its ETC designation and its corresponding benefits and obligations to the extent that it is concerned about its long-term ability to provide supported services in the affected rural study areas.35

#### A. Commission Authority to Perform the ETC Designation

13. We find that Virginia Cellular has demonstrated that the Virginia Commission lacks the jurisdiction to perform the requested ETC designation and that the Commission has authority to consider Virginia Cellular's petition under section 214(e)(6) of the Act. Specifically, Virginia Cellular states that it submitted an application for designation as an ETC with the Virginia Commission, and on April 9, 2002, the Virginia Commission issued an order stating that it had not asserted jurisdiction over CMRS carriers.<sup>36</sup> In its order, the Virginia Commission directed Virginia Cellular to file for ETC designation with the FCC.<sup>37</sup> Based on this statement by the Virginia Commission, we find that the Virginia Commission lacks jurisdiction to designate Virginia Cellular as an ETC and that this Commission has authority to perform the requested

<sup>&</sup>lt;sup>33</sup> See infra paras. 35, 39.

<sup>&</sup>lt;sup>34</sup> See Portability Public Notice, 18 FCC Rcd at 1941.

<sup>35</sup> See Declaratory Ruling, 15 FCC Rcd at 15173; see also 47 U.S.C. § 214(e)(4).

<sup>&</sup>lt;sup>36</sup> See Virginia Cellular Petition at 3-4 and Exhibit A.

<sup>&</sup>lt;sup>37</sup> Id.

ETC designation in the Commonwealth of Virginia pursuant to section 214(e)(6).38

### B. Offering and Advertising the Supported Services

- 14. Offering the Services Designated for Support. We find that Virginia Cellular has demonstrated through the required certifications and related filings, that it now offers, or will offer upon designation as an ETC, the services supported by the federal universal service support mechanism. As noted in its petition, Virginia Cellular is an "A-Band" cellular carrier for the Virginia 6 Rural Service Area, serving the counties of Rockingham, Augusta, Nelson, and Highland, as well as the cities of Harrisonburg, Staunton, and Waynesboro. 39 Virginia Cellular states that it currently provides all of the services and functionalities enumerated in section 54.101(a) of the Commission's rules throughout its cellular service area in Virginia. 40 Virginia Cellular certifies that it has the capability to offer voice-grade access to the public switched network, and the functional equivalents to DTMF signaling, single-party service, access to operator services, access to interexchange services, access to directory assistance, and toll limitation for qualifying low-income consumers. 41 Virginia Cellular also complies with applicable law and Commission directives on providing access to emergency services.<sup>42</sup> In addition, although the Commission has not set a minimum local usage requirement, Virginia Cellular certifies it will comply with "any and all minimum local usage requirements adopted by the FCC" and it intends to offer a number of local calling plans as part of its universal service offering. 43 As discussed below, Virginia Cellular has committed to report annually its progress in achieving its build-out plans at the same time it submits its annual certification required under sections 54.313 and 54.314 of the Commission's rules. 44
- 15. Virginia Cellular has also made specific commitments to provide service to requesting customers in the service areas that it is designated as an ETC. Virginia Cellular states that if a request is made by a potential customer within its existing network, Virginia Cellular will provide service immediately using its standard customer equipment. In instances where a request comes from a potential customer within Virginia Cellular's licensed service area but outside its existing network coverage, it will take a number of steps to provide service that include determining whether: (1) the requesting customer's equipment can be modified or replaced to provide service; (2) a roof-mounted antenna or other equipment can be deployed to provide service; (3) adjustments can be made to the nearest cell tower to provide service; (4) there are any other adjustments that can be made to network or customer facilities to provide service; (5) it can offer resold services from another carrier's facilities to provide service; and (6) an additional cell site, cell extender, or repeater can be employed or can be constructed to

<sup>&</sup>lt;sup>38</sup> 47 U.S.C. § 214(e)(6).

<sup>39</sup> Virginia Cellular Petition at 1.

<sup>40</sup> Id. at 2.

<sup>41</sup> Id. at 4-8 and Exhibit B.

<sup>&</sup>lt;sup>42</sup> See 47 C.F.R. § 54.101(a)(5); Virginia Cellular Petition at 7.

<sup>&</sup>lt;sup>43</sup> Id. at 5-6 and Exhibit B.

<sup>&</sup>lt;sup>44</sup> See infra para 46; Virginia Cellular November 12 Supplement at 4.

<sup>&</sup>lt;sup>45</sup> *Id.* at 3.

provide service. 46 In addition, if after following these steps, Virginia Cellular still cannot provide service, it will notify the requesting party and include that information in an annual report filed with the Commission detailing how many requests for service were unfulfilled for the past year. 47

- 16. Virginia Cellular has further committed to use universal service support to further improve its universal service offering by constructing several new cellular sites in sparsely populated areas within its licensed service area but outside its existing network coverage. Virginia Cellular estimates that it will construct 11 cell sites over the first year and a half following ETC designation. These 11 cell sites will serve a population of 157,060. Virginia Cellular notes that the parameters of its build-out plans may evolve over time as it responds to consumer demand. S1
- 17. The Virginia Rural Telephone Companies raise several concerns about Virginia Cellular's service offerings. We address each of these concerns below, and in so doing, we conclude that Virginia Cellular has demonstrated that it will offer the services supported by the federal universal service support mechanism upon designation as an ETC. Initially, we note that the Commission has held that to require a carrier to actually provide the supported services before it is designated an ETC has the effect of prohibiting the ability of prospective entrants from providing telecommunications service. <sup>52</sup> Instead, "a new entrant can make a reasonable demonstration . . . of its capability and commitment to provide universal service without the actual provision of the proposed service."
- 18. We also reject the argument of the Virginia Rural Telephone Companies that Virginia Cellular does not offer all of the services supported by the federal universal service support mechanisms as required by section 214(e)(1)(A).<sup>54</sup> Specifically, the Virginia Rural Telephone Companies claim that Virginia Cellular: (1) has not yet upgraded from analog to digital and until

<sup>&</sup>lt;sup>46</sup> *Id.* at 3-4.

<sup>&</sup>lt;sup>47</sup> Id. at 4.

<sup>&</sup>lt;sup>48</sup> *Id.* at 4-5.

<sup>&</sup>lt;sup>49</sup> *Id.* at 4-5 and Attachment. For purposes of this analysis, we exclude Virginia Cellular's proposed cell site in Crimora, Augusta County, Virginia, which would be located in the study area of NTELOS. As discussed above, we deny Virginia Cellular's request for ETC designation in the NTELOS study area.

<sup>&</sup>lt;sup>50</sup> *Id.* Virginia Cellular estimates the populations covered by these cell sites as follows: Hinton (population of 65,027), North Harrisonburg (population of 52,750), Churchville (population of 5,865), Spottswood (population of 7,114), Central Nelson (population of 9,354), Middlebrook (population of 4,749), Bergton (population of 2,987), Afton (population of 7,064), McDowell (population of 731), Mustoe (population of 1,094), and West Augusta (population of 325). *Id.* at 5 and Attachment.

<sup>&</sup>lt;sup>51</sup> *Id.* at 5.

<sup>&</sup>lt;sup>52</sup> See Declaratory Ruling, 15 FCC Rcd at 15173-74, paras. 12-14. In the Declaratory Ruling, the Commission stated that "a new entrant cannot reasonably be expected to be able to make the substantial financial investment required to provide the supported services in high-cost areas without some assurance that it will be eligible for federal universal service support." *Id.* at 15173, para. 13.

<sup>&</sup>lt;sup>53</sup> Id. at 15178, para. 24.

<sup>&</sup>lt;sup>54</sup> See Virginia Rural Telephone Companies Comments at 4-6.

this happens, Virginia Cellular cannot effectively implement E-911 or the Communications Assistance for Law Enforcement Act (CALEA); (2) offers no local usage; (3) has stated that its customers will not have equal access to interexchange carriers; (4) states only that it will participate "as required" with respect to Lifeline service; and (5) has wireless signals that are sporadic or unavailable in some of the mountainous regions that Virginia Cellular proposes to serve. <sup>55</sup>

- 19. We find that Virginia Cellular's commitment to provide access to emergency services is sufficient. Virginia Cellular states that it is in compliance with state and federal 911 and E-911 mandates and is upgrading from analog to digital technology. Virginia Cellular states that it is implementing Phase I E-911 services in those areas where local governments have developed E-911 functionality and that upon designation as an ETC, it will be able to effectively implement E-911. 57
- 20. We find sufficient Virginia Cellular's showing that it will offer minimum local usage as part of its universal service offering. Therefore, we reject the Virginia Rural Telephone Companies' claim that Virginia Cellular should be denied ETC designation because it does not currently offer any local usage. Although the Commission did not set a minimum local usage requirement, in the *Universal Service Order*, it determined that ETCs should provide some minimum amount of local usage as part of their "basic service" package of supported services. Virginia Cellular states that it will comply with any and all minimum local usage requirements adopted by the FCC. It adds that it will meet the local usage requirements by including a variety of local usage plans as part of a universal service offering. In addition, Virginia Cellular states that its current rate plans include access to the local exchange network, and that many plans include a large volume of minutes. Accordingly, we find that Virginia Cellular's commitment to provide local usage is sufficient.
- 21. We reject the Virginia Rural Telephone Companies' claim that ETC designation should be denied because Virginia Cellular's customers will not have equal access to

<sup>&</sup>lt;sup>55</sup> *Id*. at 5-6.

<sup>&</sup>lt;sup>56</sup> See Supplement to Virginia Cellular, LLC Petition for Designation as an ETC in the Commonwealth of Virginia, filed October 3, 2002 at 3-4 (Virginia Cellular October 3 Supplement); Virginia Cellular October 11 Supplement at 3.

<sup>&</sup>lt;sup>57</sup> See Virginia Cellular Reply Comments at 3.

<sup>&</sup>lt;sup>58</sup> Virginia Rural Telephone Companies Comments at 5.

<sup>&</sup>lt;sup>59</sup> See Federal-State Joint Board on Universal Service, Report and Order, CC Docket No, 96-45, 12 FCC Rcd 8776, 8813, para. 67 (1997) (Universal Service Order) (subseq. history omitted). Although the Commission's rules define "local usage" as "an amount of minutes of use of wire center service, prescribed by the Commission, provided free of charge to end users," the Commission has not specified a number of minutes of use. See 47 C.F.R. § 54.101(a)(2). See also Federal-State Joint Board on Universal Service, Recommended Decision, CC Docket No. 96-45, FCC 02J-1 (rel. Jul. 10, 2002) (Supported Services Recommended Decision).

<sup>&</sup>lt;sup>60</sup> Virginia Cellular Petition at 5-6.

<sup>61</sup> Id. at 6.

<sup>&</sup>lt;sup>62</sup> Virginia Cellular Reply Comments at 4.

interexchange carriers.<sup>63</sup> Section 54.101(a)(7) of the rules states that one of the supported services is access to interexchange services, not equal access to those services.<sup>64</sup> Virginia Cellular states that it provides access to interexchange services.<sup>65</sup> Accordingly, we find sufficient Virginia Cellular's showing that it will offer access to interexchange services.

- 22. We find that Virginia Cellular's commitment to participate in the Lifeline and Linkup programs is sufficient. In its petition, Virginia Cellular states that it currently has no Lifeline customers, and upon designation as an ETC, it will participate in Lifeline as required. Virginia Cellular also states that it will advertise the availability of Lifeline service to its customers. Although Virginia Cellular does not currently advertise Lifeline to its customers, we note that the advertising rules for Lifeline and Linkup services apply only to already-designated ETCs. Thus, we find sufficient Virginia Cellular's commitment to participate in Lifeline and Linkup.
- 23. Although the Virginia Rural Telephone Companies claim that Virginia Cellular's wireless signals are sporadic in certain areas, we find that the existence of so-called "dead spots" in Virginia Cellular's network does not preclude us from designating Virginia Cellular as an ETC. The Commission has already determined that a telecommunications carrier's inability to demonstrate that it can provide ubiquitous service at the time of its request for designation as an ETC should not preclude its designation as an ETC. Moreover, as stated above, Virginia Cellular has committed to improve its network. In addition, the Commission's rules acknowledge the existence of dead spots. Dead spots" are defined as "[s]mall areas within a service area where the field strength is lower than the minimum level for reliable service. Section 22.99 of the Commission's rules states that "[s]ervice within dead spots is presumed." Additionally, the Commission's rules provide that "cellular service is considered to be provided in all areas, including dead spots... Because "dead spots" are acknowledged by the Commission's rules, we are not persuaded by the Virginia Rural LECs that the possibility of

<sup>&</sup>lt;sup>63</sup> Virginia Rural Telephone Companies Comments at 5.

<sup>&</sup>lt;sup>64</sup> 47 C.F.R. §54.101(a)(7). We note that in July 2002, four members of the Joint Board recommended adding equal access as a supported service. *See Supported Services Recommended Decision*, at paras. 75-86. In July 2003, the Commission decided to defer consideration of this issue pending resolution of the Commission's proceeding examining the rules relating to high-cost universal service support in competitive areas. *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order and Order on Reconsideration, 18 FCC Rcd 15,090, 15,104, para. 33 (2003).

<sup>&</sup>lt;sup>65</sup> Virginia Cellular Reply Comments at 4-5.

<sup>66</sup> Virginia Cellular Petition at 8.

<sup>&</sup>lt;sup>67</sup> Virginia Cellular Reply Comments at 5.

<sup>&</sup>lt;sup>68</sup> See Twelfth Report and Order, 15 FCC Rcd at 12249-50, para. 76-80.

<sup>&</sup>lt;sup>69</sup> See Declaratory Ruling, 15 FCC Rcd at 15175, para. 17.

<sup>&</sup>lt;sup>70</sup> See supra para. 16; Virginia Cellular Petition at 2, 17 and Virginia Cellular October 3 Supplement at 2, Virginia Cellular November 12 Supplement at 4-5 and Attachment.

<sup>&</sup>lt;sup>71</sup> See 47 C.F.R. § 22.99.

<sup>72</sup> Id.

<sup>&</sup>lt;sup>73</sup> Id.

<sup>&</sup>lt;sup>74</sup> See 47 C.F.R. § 22.911(b).

dead spots demonstrates that Virginia Cellular is not willing or capable of providing acceptable levels of service throughout its service area.

- 24. Offering the Supported Services Using a Carrier's Own Facilities. Virginia Cellular has demonstrated that it satisfies the requirement of section 214(e)(1)(A) that it offer the supported services using either its own facilities or a combination of its own facilities and resale of another carrier's services. Virginia Cellular states that it intends to provide the supported services using its cellular network infrastructure, which includes "the same antenna, cell-site, tower, trunking, mobile switching, and interconnection facilities used by the company to serve its existing conventional mobile cellular service customers." We find that this certification is sufficient to satisfy the facilities requirement of section 214(e)(1)(A).
- 25. Advertising the Supported Services. We conclude that Virginia Cellular has demonstrated that it satisfies the requirement of section 214(e)(1)(B) to advertise the availability of the supported services and the charges therefor using media of general distribution. 77 Virginia Cellular certifies that it "will use media of general distribution that it currently employs to advertise its universal service offerings throughout the service areas designated by the Commission."<sup>78</sup> In addition, Virginia Cellular details alternative methods that it will employ to advertise the availability of its services. For example, Virginia Cellular will provide notices at local unemployment, social security, and welfare offices so that unserved consumers can learn about Virginia Cellular's service offerings and learn about Lifeline and Linkup discounts.<sup>79</sup> Virginia Cellular also commits to publicize locally the construction of all new facilities in unserved or underserved areas so customers are made aware of improved service. 80 We find that Virginia Cellular's certification and its additional commitments to advertising its service offerings satisfy section 214(e)(1)(B). In addition, as the Commission has stated in prior decisions, because an ETC receives universal service support only to the extent that it serves customers, we believe that strong economic incentives exist, in addition to the statutory obligation, for an ETC to advertise its universal service offering in its designated service area. 81

#### C. Public Interest Analysis

26. We conclude that it is "consistent with the public interest, convenience, and necessity" to designate Virginia Cellular as an ETC for the portion of its requested service area that is served by the non-rural telephone companies Bell Atlantic and GTE South, Inc. We also conclude that it is in the public interest to designate Virginia Cellular as an ETC in Virginia in the study areas served by five of the six affected rural telephone companies. In determining whether the public interest is served, the Commission places the burden of proof upon the ETC applicant. We conclude that Virginia Cellular has satisfied the burden of proof in establishing

<sup>&</sup>lt;sup>75</sup> 47 U.S.C. § 214(e)(1)(A).

<sup>&</sup>lt;sup>76</sup> Virginia Cellular Petition at 9.

<sup>&</sup>lt;sup>77</sup> 47 U.S.C. § 214(e)(1)(B).

<sup>&</sup>lt;sup>78</sup> Virginia Cellular Petition at 9.

<sup>&</sup>lt;sup>79</sup> Virginia Cellular November 12 Supplement at 5.

<sup>&</sup>lt;sup>80</sup> *Id*.

<sup>81</sup> See Pine Ridge Order, 16 FCC Rcd at 18137, para. 10.

that its universal service offering in these areas will provide benefits to rural consumers. We do not designate Virginia Cellular as an ETC, however, for the study area of NTELOS because we find that Virginia Cellular has not satisfied its burden of proof in this instance.<sup>82</sup>

27. Non-Rural Study Areas. We conclude that it is "consistent with the public interest, convenience, and necessity" to designate Virginia Cellular as an ETC for the portion of its requested service area that is served by the non-rural telephone companies of Bell Atlantic and GTE South. 83 We note that the Bureau previously has found designation of additional ETCs in areas served by non-rural telephone companies to be per se in the public interest based upon a demonstration that the requesting carrier complies with the statutory eligibility obligations of section 214(e)(1) of the Act. 84 We do not believe that designation of an additional ETC in a nonrural telephone company's study area based merely upon a showing that the requesting carrier complies with section 214(e)(1) of the Act will necessarily be consistent with the public interest in every instance. We nevertheless conclude that Virginia Cellular's public interest showing here is sufficient based on the detailed commitments Virginia Cellular made to ensure that it provides high quality service throughout the proposed rural and non-rural service areas; indeed, given our finding that Virginia Cellular has satisfied the more rigorous public interest analysis for the rural study areas, it follows that its commitments satisfy the public interest requirements for non-rural areas. 85 We also note that no parties oppose Virginia Cellular's request for ETC designation in the study areas of these non-rural telephone companies. We therefore conclude that Virginia Cellular has demonstrated that its designation as an ETC in the study areas of these non-rural telephone companies, is consistent with the public interest, as required by section 214(e)(6).86 We further note that the Joint Board is reviewing whether to modify the public interest analysis used to designate ETCs in both rural and non-rural carrier study areas under section 214(e) of the Act. 87 The outcome of that proceeding could impact the Commission's public interest analysis for future ETC designations in non-rural telephone company service areas.

28. Rural Study Areas. Based on the record before us, we conclude that grant of this ETC designation for the requested rural study areas, in part, is consistent with the public interest. In considering whether designation of Virginia Cellular as an ETC will serve the public interest, we have considered whether the benefits of an additional ETC in the wire centers for which Virginia Cellular seeks designation outweigh any potential harms. We note that this balancing of benefits and costs is a fact-specific exercise. In determining whether designation of a competitive ETC in a rural telephone company's service area is in the public interest, we weigh the benefits of increased competitive choice, the impact of the designation on the universal service fund, the unique advantages and disadvantages of the competitor's service offering, any

<sup>82</sup> See infra para. 35.

<sup>83</sup> See 47 U.S.C. § 214(e)(6). See also Appendix A.

<sup>&</sup>lt;sup>84</sup> See, e.g., Cellco Partnership d/b/a Bell Atlantic Mobile Petition for Designation as an Eligible Telecommunications Carrier, CC Docket No. 96-45, Memorandum Opinion and Order, 16 FCC Rcd 39 (Com. Car. Bur. 2000).

<sup>85</sup> See Virginia Cellular November 12 Supplement at 4-5, Attachment; infra para. 28.

<sup>86</sup> See 47 U.S.C. § 214(e)(6).

<sup>&</sup>lt;sup>87</sup> See Portability Public Notice, 18 FCC Rcd at 1954-55, para. 33.

commitments made regarding quality of telephone service, and the competitive ETC's ability to satisfy its obligation to serve the designated service areas within a reasonable time frame. We recognize that as part of its review of the ETC designation process in the pending proceeding examining the rules relating to high-cost support in competitive areas, the Commission may adopt a different framework for the public interest analysis of ETC applications. This Order does not prejudge the Joint Board's deliberations in that proceeding and any other public interest framework that the Commission might ultimately adopt.

- 29. Virginia Cellular's universal service offering will provide benefits to customers in situations where they do not have access to a wireline telephone. For instance, Virginia Cellular has committed to serve residences to the extent that they do not have access to the public switched network through the incumbent telephone company. Also, the mobility of Virginia Cellular's wireless service will provide other benefits to consumers. For example, the mobility of telecommunications assists consumers in rural areas who often must drive significant distances to places of employment, stores, schools, and other critical community locations. In addition, the availability of a wireless universal service offering provides access to emergency services that can mitigate the unique risks of geographic isolation associated with living in rural communities. Virginia Cellular also submits that, because its local calling area is larger than those of the incumbent local exchange carriers it competes against, Virginia Cellular's customers will be subject to fewer toll charges.
- 30. We acknowledge arguments made in the record that wireless telecommunications offerings may be subject to dropped calls and poor coverage. Parties also have noted that wireless carriers often are not subject to mandatory service quality standards. Virginia Cellular has committed to mitigate these concerns. Virginia Cellular assures the Commission that it will alleviate dropped calls by using universal service support to build new towers and facilities to offer better coverage. As evidence of its commitment to high service quality, Virginia Cellular has also committed to comply with the Cellular Telecommunications Industry Association Consumer Code for Wireless Service, which sets out certain principles, disclosures, and practices for the provision of wireless service. In addition, Virginia Cellular has committed to provide

<sup>&</sup>lt;sup>88</sup> Virginia Cellular November 12 Supplement at 3-4. According to Virginia Cellular, 11 out of 12 of its proposed cell sites contain some area that is unserved by Virginia Cellular's facilities and/or wireline networks. See id. at 3; but see Virginia Rural Telephone Companies Comments at 3 (stating that there is an incumbent ETC in all the areas where Virginia Cellular seeks ETC designation).

<sup>&</sup>lt;sup>89</sup> Virginia Cellular Petition at 16 (citing Smith Bagley, Inc., Order, Decision No. 63269, Docket No. T-02556A-99-0207 (Ariz. Corp. Comm'n Dec. 15, 2001) (finding that competitive entry provides a potential solution to "health and safety risks associated with geographic isolation"). See also Twelfth Report and Order, 15 FCC Rcd at 12212, para. 3.

<sup>&</sup>lt;sup>90</sup> See Virginia Cellular Petition at 17; Virginia Cellular April 3 Supplement at 1-2.

<sup>91</sup> See e.g., Virginia Rural Telephone Companies Comments at 6; 12 Va. Admin. Code § 5-400-80.

<sup>&</sup>lt;sup>92</sup> See Virginia Rural Telephone Companies Comments at 6; 12 Va. Admin. Code § 5-400-80.

<sup>93</sup> See Virginia Cellular November 12 Supplement at 1.

<sup>&</sup>lt;sup>94</sup> Id.; CTIA, Consumer Code for Wireless Service, available at <a href="http://www.wow-com.com/pdf/The\_Code.pdf">http://www.wow-com.com/pdf/The\_Code.pdf</a>. Under the CTIA Consumer Code, wireless carriers agree to: (1) disclose rates and terms of service to customers; (2) make available maps showing where service is generally available; (3) provide contract terms to customers and confirm changes in service; (4) allow a trial period for new service; (5) provide specific disclosures in advertising;

the Commission with the number of consumer complaints per 1,000 handsets on an annual basis. <sup>95</sup> Therefore, we find that Virginia Cellular's commitment to provide better coverage to unserved areas and its other commitments discussed herein adequately address any concerns about the quality of its wireless service.

31. Although we find that grant of this ETC designation will not dramatically burden the universal service fund, we are increasingly concerned about the impact on the universal service fund due to the rapid growth in high-cost support distributed to competitive ETCs. 96 Specifically, although competitive ETCs only receive a small percentage of all high-cost universal service support, the amount of high-cost support distributed to competitive ETCs is growing at a dramatic pace. For example, in the first quarter of 2001, three competitive ETCs received approximately \$2 million or 0.4 percent of high-cost support. 97 In the fourth quarter of 2003, 112 competitive ETCs are projected to receive approximately \$32 million or 3.7 percent of high-cost support. 98 This concern has been raised by parties in this proceeding, especially as it relates to the long-term sustainability of universal service high-cost support. Specifically, commenters argue that designation of competitive ETCs will place significant burdens on the federal universal service fund without any corresponding benefits. 99 We recognize these commenters raise important issues regarding universal service support. As discussed above, the Commission has asked the Joint Board to examine, among other things, the Commission's rules relating to high-cost universal service support in service areas in which a competitive ETC is providing service, as well as the Commission's rules regarding support for second lines. 100 We note that the outcome of the Commission's pending proceeding examining the rules relating to

<sup>(6)</sup> separately identify carrier charges from taxes on billing statements; (7) provide customers the right to terminate service for changes to contract terms; (8) provide ready access to customer service; (9) promptly respond to consumer inquiries and complaints received from government agencies; and (10) abide by policies for protection of consumer privacy. See id.

<sup>&</sup>lt;sup>95</sup> See infra para. 46 (requesting that Virginia Cellular provide consumer complaint data on October 1 of each year).

<sup>&</sup>lt;sup>96</sup> For example, assuming, that Virginia Cellular captures each and every customer located in the five affected rural study areas, the overall size of the high-cost support mechanisms would not significantly increase because the total amount of high-cost universal service support available to incumbent carriers in the rural study areas where we grant Virginia Cellular ETC designation is only approximately 0.105% percent of the total high-cost support available to all ETCs. See Federal Universal Service Support Mechanisms Fund Size Projections for the Fourth Quarter of 2003, Appendix HC 1 (Universal Service Administrative Company, August 1, 2003) (determining that the total amount of high-cost universal service support available to incumbent carriers in the affected rural study areas is projected to be \$899,706 out of a total of \$857,903,276 in the fourth quarter of 2003). We note, however, in light of the rapid growth in competitive ETCs, comparing the impact of one competitive ETC on the overall fund may be inconclusive. We hope that the Joint Board will speak to this issue in the proceeding addressing rules relating to high-cost support in competitive areas.

<sup>&</sup>lt;sup>97</sup> See Federal Universal Service Support Mechanisms Fund Size Projections for the First Quarter of 2001 (Universal Service Administrative Company, Jan. 31, 2002).

<sup>&</sup>lt;sup>98</sup> Federal Universal Service Support Mechanisms Fund Size Projections for the Fourth Quarter of 2003 (Universal Service Administrative Company, Aug. 1, 2003). At the same time, we recognize that high-cost support to incumbent ETCs has grown significantly in real and percentage terms over the same period. *See generally, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Cellular Telecommunications Industry Association's Comments, filed May 5, 2003.

<sup>&</sup>lt;sup>99</sup> See Virginia Rural Telephone Companies Comments at 2-4; NTCA Comments at 2-4, 8-9.

<sup>100</sup> See Portability Public Notice.

high-cost support in competitive areas could potentially impact, among other things, the support that Virginia Cellular and other competitive ETCs may receive in the future. It is our hope that the Commission's pending rulemaking proceeding also will provide a framework for assessing the overall impact of competitive ETC designations on the universal service mechanisms.

- 32. Additionally, we conclude that, for most of the rural areas in which Virginia Cellular seeks ETC designation, such designation does not raise the rural creamskimming and related concerns alleged by commenters. <sup>101</sup> Rural creamskimming occurs when competitors seek to serve only the low-cost, high revenue customers in a rural telephone company's study area. <sup>102</sup> In this case, because the contour of its CMRS licensed area differs from the existing rural telephone companies' study areas, Virginia Cellular will be unable to provide facilities-based service to the entirety of the study areas of three of the six affected rural telephone companies Shenandoah, MGW, and NTELOS. Generally, a request for ETC designation for an area less than the entire study area of a rural telephone company might raise concerns that the petitioner intends to creamskim in the rural study area. <sup>103</sup> In this case, however, Virginia Cellular commits to provide universal service throughout its licensed service area. <sup>104</sup> It therefore does not appear that Virginia Cellular is deliberately seeking to enter only certain portions of these companies' study areas in order to creamskim.
- 33. At the same time, we recognize that, for reasons beyond a competitive carrier's control, the lowest cost portion of a rural study area may be the only portion of the study area that a wireless carrier's license covers. Under these circumstances, granting a carrier ETC designation for only its licensed portion of the rural study area may have the same effect on the ILEC as rural creamskimming.
- 34. We have analyzed the record before us in this matter and find that, for the study areas of Shenandoah and MGW, Virginia Cellular's designation as an ETC is unlikely to undercut the incumbents' ability to serve the entire study area. Our analysis of the population density of each of the affected wire centers reveals that, for the study areas of MGW and Shenandoah, Virginia Cellular will not be serving only low-cost areas to the exclusion of high-cost areas. <sup>106</sup> Although

<sup>&</sup>lt;sup>101</sup> See NTCA Comments at 5-6; see also Virginia Rural Telephone Companies Comments at 11.

<sup>&</sup>lt;sup>102</sup> See 1996 Recommended Decision, 12 FCC Rcd at 180, para. 172. "Creamskimming" refers to the practice of targeting only the customers that are the least expensive to serve, thereby undercutting the ILEC's ability to provide service throughout the area. See, e.g., Universal Service Order, 12 FCC Rcd at 8881-2, para. 189.

<sup>&</sup>lt;sup>103</sup> See 1996 Recommended Decision, 12 FCC Rcd at 180, para. 172 (stating that potential creamskimming is minimized when competitors, as a condition of eligibility for universal service support, must provide services throughout a rural telephone company's study area).

<sup>104</sup> See Virginia Cellular Petition at 2, 13.

<sup>105</sup> See NTCA Comments at 5.

<sup>106</sup> The Virginia Rural Telephone Companies express concerns about use of the term "wire center" versus "exchange" as the relevant area designated for support. See Virginia Rural Telephone Companies November 8, 2002 ex parte (stating that, in Virginia, the defined area for regulatory purposes is "exchange"). Virginia Cellular responded that the rural ILEC exchanges in Virginia contain a single wire center and therefore use of the term "wire center" is synonymous with "exchange." See Virginia Cellular November 20 Supplement at 2. The Virginia Rural Telephone Companies also state "generally, in rural companies there is one wire center per exchange." See Virginia Rural Telephone Companies November 8 ex parte. We note that the Commission has historically viewed high cost

there are other factors that define high-cost areas, a low population density typically indicates a high-cost area. Our analysis of population density reveals that Virginia Cellular is serving not only the lower cost, higher density wire centers in the study areas of MGW and Shenandoah. The population density for the Shenandoah wire center for which Virginia Cellular seeks ETC designation is approximately 4.64 persons per square mile and the average population density for Shenandoah's remaining wire centers is approximately 53.62 persons per square mile. The average population density for the MGW wire centers for which Virginia Cellular seeks ETC designation is approximately 2.30 persons per square mile and the average population density for MGW's remaining wire centers is approximately 2.18 persons per square mile.

35. We conclude, however, for the following reasons, that it would not be in the public interest to designate Virginia Cellular as an ETC in the study area of NTELOS. Virginia Cellular's licensed CMRS area covers only the Waynesboro wire center in NTELOS' study area. Based on our examination of the population densities of the wire centers in NTELOS' study area, we find that Waynesboro is the lowest-cost, highest-density wire center in the study area of NTELOS, and that there is a great disparity in density between the Waynesboro wire center and the NTELOS wire centers outside Virginia Cellular's service area. The population density in the Waynesboro wire center is approximately 273 persons per square mile, while the average population density of the remaining wire centers in NTELOS' study area is approximately 33

support in terms of wire centers. See, e.g., 47 U.S.C. § 54.309. Thus, consistent with our rules, hereinafter in this order, we will discuss support in terms of wire centers.

<sup>107</sup> See Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, CC Docket No. 00-256, Second Report and Order and Further Notice of Proposed Rulemaking, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Fifteenth Report and Order, Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation, CC Docket No. 98-77, Report and Order, Prescribing the Authorized Rate of Return From Interstate Services of Local Exchange Carriers, CC Docket No. 98-166, Report and Order, 16 FCC Rcd 19613, para. 28 (2001) (MAG Order), recon. pending (discussing Rural Task Force White Paper 2 at <a href="http://www.wutc.wa.gov/rtf">http://www.wutc.wa.gov/rtf</a>) (stating that "[r]ural carriers generally serve more sparsely populated areas and fewer large, high-volume subscribers than non-rural carriers" and that "[t]he isolation of rural carrier service areas creates numerous operational challenges, including high loop costs, high transportation costs for personnel, equipment, and supplies, and the need to invest more resources to protect network reliability").

<sup>&</sup>lt;sup>108</sup> See Virginia Cellular October 29 Supplement. We note that the Virginia Rural Telephone Companies object to accuracy of the population density data submitted by Virginia Cellular. Rather than submitting different population density data, however, the Virginia Rural Telephone Companies submitted line count data. See Virginia Rural Telephone Companies November 8 ex parte. Virginia Cellular's response is that it calculated population density using the software program Exchange Plus by MapInfo, which allows a user to "simultaneously query an ILEC's exchange and the Census Bureau population database." See Virginia Cellular November 20 Supplement. Virginia Cellular asserts that this software is commonly used in the telecommunications industry and yields accurate data. Id. Our review of the line count data submitted by the Virginia Rural Telephone Companies reveals that Virginia Cellular will be serving many of the high-cost, low-density wire centers in the study areas of MGW and Shenandoah. Accordingly, this line count analysis is consistent with the population density analysis that was based on data submitted by Virginia Cellular.

<sup>&</sup>lt;sup>109</sup> See Virginia Cellular October 29 Supplement.

<sup>&</sup>lt;sup>110</sup> See id. Although the average population density of the MGW wire centers which Virginia Cellular proposes to serve is slightly higher than the average population density of MGW's remaining wire centers, the amount of this difference is not significant enough to raise creamskimming concerns. We also note that there is very little disparity between the population densities of the wire centers in the MGW study area.

persons per square mile. 111 Universal service support is calculated on a study-area-wide basis. Although NTELOS did not take advantage of the Commission's disaggregation options to protect against possible uneconomic entry in its lower-cost area, 112 we find on the facts here that designating Virginia Cellular as an ETC only for the Waynesboro wire center could potentially significantly undermine NTELOS' ability to serve its entire study area. The widely disparate population densities in NTELOS' study area and the status of Waynesboro as NTELOS' sole low-cost, high-density wire center could result in such an ETC designation placing NTELOS at a sizeable unfair competitive disadvantage. In addition, we believe that, if NTELOS had disaggregated, the low costs of service in the Waynesboro wire center would have resulted in little or no universal service support targeted to those lines. 113 Therefore, our decision not to designate Virginia Cellular as an ETC in the study area of NTELOS is unlikely to impact consumers in the Waynesboro wire center because Virginia Cellular will make a business decision on whether to provide service in that area without regard to the potential receipt of universal service support.

#### D. Designated Service Area

36. Virginia Cellular is designated an ETC in the areas served by the non-rural carriers Bell Atlantic and GTE South, as listed in Appendix A. We designate Virginia Cellular as an ETC throughout most of its CMRS licensed service area in the Virginia 6 Rural Service Area. Virginia Cellular is designated an ETC in the areas served by the three rural telephone companies whose study areas Virginia Cellular is able to serve completely, as listed in Appendix B. As discussed below, and subject to the Virginia Commission's agreement on redefining the

<sup>111</sup> See id.

<sup>112</sup> In the RTF Order, the Commission provided incumbent LECs with certain options for disaggregating their study areas, determining that universal service support should be disaggregated and targeted below the study area level to eliminate uneconomic incentives for competitive entry caused by the averaging of support across all lines served by a carrier within its study area. Under disaggregation and targeting, per-line support is more closely associated with the cost of providing service. There are fewer issues regarding inequitable universal service support and potential harm to concerns regarding the incumbent's ability to serve its entire study area when there is in place a disaggregation plan in which the per-line support available to a competitive ETC in the wire centers located in "lowcost" zones is less than the amount a competitive ETC could receive if it served in one of the wire centers located in the "high-cost" zones. See Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, 16 FCC Rcd 11244, 11302, para. 145 (2001) (RTF Order), as corrected by Errata, CC Docket Nos. 96-45, 00-256 (Acc. Pol. Div. rel. Jun. 1, 2001), recon, pending. Although the deadline (May 15, 2002) for carriers to file disaggregation plans has passed, the relevant state commission or appropriate regulatory authority may nonetheless require a carrier to disaggregate. either on its own motion or that of an interested party. See USAC's website, http://www.universalservice.org/hc/disaggregation; see also RTF Order, 16 FCC Rcd at 11303, para. 147.

<sup>&</sup>lt;sup>113</sup> Section 54.315(d)(2)(ii) of the Commission's rules requires self-certified disaggregation plans to "be reasonably related to the cost of providing service for each disaggregation zone within each disaggregated category of support." 47 C.F.R. § 54.315(d)(2)(ii).

<sup>&</sup>lt;sup>114</sup> See Virginia Cellular Petition at 10 and Exhibit D. We note that, when designating a service area served by a non-rural carrier, the Commission may designate a service area that is smaller than the contours of the incumbent carrier's study area. See Universal Service Order, 12 FCC Rcd at 8879-90, paras. 184-85.

<sup>&</sup>lt;sup>115</sup> See Virginia Cellular Petition at 10-11 and Exhibit E.

service areas of MGW and Shenandoah, we also designate Virginia Cellular as an ETC for the entire Bergton, McDowell, Williamsville, and Deerfield wire centers.

- 37. We designate Virginia Cellular as an ETC in the entire Deerfield, McDowell, and Williamsville wire centers in the study area of MGW. We note that, although the boundaries of its CMRS licensed service area in Virginia exclude a small part of MGW's Williamsville wire center, Virginia Cellular has committed nevertheless to offer service to customers in the entirety of the Williamsville wire center through a combination of its own facilities and resale of either wireless or wireline services. 117
- 38. We also designate Virginia Cellular as an ETC for the Bergton wire center in Shenandoah's study area. We note that the study area of Shenandoah is composed of two noncontiguous areas. One such area is composed solely of the Bergton wire center, which falls within Virginia Cellular's licensed service area, and the other area is composed of eight remaining wire centers, which fall outside of Virginia Cellular's licensed service area. 118 We find that, because the Bergton wire center is a low-density, high-cost wire center, concerns about undermining Shenandoah's ability to serve the entire study area are substantially minimized. We further note that the Commission has previously expressed concern about requiring competitive ETCs to serve non-contiguous areas. In the Universal Service Order, the Commission concluded that requiring a carrier to serve a non-contiguous service area as a prerequisite of eligibility might impose a serious barrier to entry, particularly to wireless carriers. The Commission further concluded that "imposing additional burdens on wireless entrants would be particularly harmful in rural areas...." Accordingly, we find that denying Virginia Cellular ETC status for Shenandoah's Bergton wire center simply because Virginia Cellular is not licensed to serve the eight remaining wire centers would be inappropriate. Thus, we conclude that it is appropriate to designate Virginia Cellular as an ETC for the Bergton wire center within Shenandoah's study area.
- 39. Finally, for the reasons described above, we do not designate Virginia Cellular as an ETC in any portion of NTELOS' service area. 121

#### E. Redefining Rural Telephone Company Service Areas

40. We redefine the service areas of MGW and Shenandoah pursuant to section 214(e)(5). Consistent with prior rural service area redefinitions, we redefine each wire center in

<sup>&</sup>lt;sup>116</sup> MGW's study area consists of the Deerfield, McDowell, Williamsville, Mountain Grove, and McClung wire centers. Virginia Cellular is licensed to completely serve the Deerfield and McDowell wire centers and to partially serve the Williamsville wire center. *See* Virginia Cellular Amendment at 2.

<sup>&</sup>lt;sup>117</sup> See Appendix C. Virginia Cellular's wireless license covers all but approximately 200 people in 13.5 square miles of the Williamsville wire center. See Virginia Cellular October 11 Supplement at 2; Virginia Cellular April 17 Supplement at 2.

<sup>&</sup>lt;sup>118</sup> The other wire centers within Shenandoah's study area are: Bayse, Edinburg, Fort Valley, Mount Jackson, New Market, Strasburg, Toms Brook, and Woodstock, all in Virginia.

<sup>&</sup>lt;sup>119</sup> Universal Service Order, 12 FCC Rcd at 8882, para, 190.

<sup>120</sup> Id. at 8883, para. 190.

<sup>&</sup>lt;sup>121</sup> See supra para. 35.

the MGW and Shenandoah study areas as a separate service area. Our decision to redefine the service areas of these telephone companies is subject to the review and final agreement of the Virginia Commission in accordance with applicable Virginia Commission requirements. Accordingly, we submit our redefinition proposal to the Virginia Commission and request that it examine such proposal based on its unique familiarity with the rural areas in question.

- 41. In order to designate Virginia Cellular as an ETC in a service area that is smaller than the affected rural telephone company study areas, we must redefine the service areas of the rural telephone companies in accordance with section 214(e)(5) of the Act. We define the affected service areas only to determine the portions of rural service areas in which to designate Virginia Cellular and future competitive carriers seeking ETC designation in the same rural service areas. Any future competitive carrier seeking ETC designation in these redefined rural service areas will be required to demonstrate that such designation will be in the public interest. In defining the rural telephone companies' service areas to be different than their study areas, we are required to act in concert with the relevant state commission, "taking into account the recommendations" of the Joint Board. The Joint Board's concerns regarding rural telephone company service areas as discussed in the 1996 Recommended Decision are as follows: (1) minimizing creamskimming; (2) recognizing that the 1996 Act places rural telephone companies on a different competitive footing from other LECs; and (3) recognizing the administrative burden of requiring rural telephone companies to calculate costs at something other than a study area level. We find that the proposed redefinition properly addresses these concerns.
- 42. First, we conclude that redefining the affected rural telephone company service areas at the wire center level for MGW and Shenandoah should not result in opportunities for creamskimming. Because Virginia Cellular is limited to providing facilities-based service only where it is licensed by the Commission and because Virginia Cellular commits to providing universal service throughout its licensed territory in Virginia, concerns regarding creamskimming are minimized. <sup>127</sup> In addition, we have analyzed the population densities of the wire centers Virginia Cellular can and cannot serve to determine whether the effects of creamskimming would occur. <sup>128</sup> We note that we do not propose redefinition in areas where ETC designation would potentially undermine the incumbent's ability to serve its entire study

<sup>&</sup>lt;sup>122</sup> See RCC Holdings ETC Designation Order, 17 FCC Rcd at 23547, para. 37. We do not designate Virginia as an ETC in the study area of NTELOS. Thus, we do not redefine the service area of NTELOS. In its original petition, Virginia Cellular stated that the Commission might choose not to redefine the service area of MGW, because Virginia Cellular serves all but a small portion of MGW's study area. See Virginia Cellular Petition at 12. Subsequently, Virginia Cellular amended its petition, explaining that there are two additional wire centers (McClung and Mountain Grove) within MGW's service area that it does not propose to serve. See Virginia Cellular Amendment at 2. In its amended petition, Virginia Cellular asks the Commission to reclassify each of MGW's five wire centers as separate service areas. Id.

<sup>123</sup> See 47 U.S.C. § 214(e)(5).

<sup>124</sup> See 47 U.S.C. § 214(e)(2), (6).

<sup>&</sup>lt;sup>125</sup> See 47 U.S.C. § 214(e)(5).

<sup>&</sup>lt;sup>126</sup> See 1996 Recommended Decision, 12 FCC Rcd at 179-80, paras. 172-74.

<sup>&</sup>lt;sup>127</sup> See supra para. 32.

<sup>&</sup>lt;sup>128</sup> See supra paras, 32-35.

area. 129 Therefore, we conclude, based on the particular facts of this case, that there is little likelihood of rural creamskimming effects in redefining the service areas of MGW and Shenandoah as proposed.

- 43. Second, our decision to redefine the service areas of the affected rural telephone companies includes special consideration for the affected rural carriers. Nothing in the record convinces us that the proposed redefinition will harm the incumbent rural carriers. The high-cost universal service mechanisms support all lines served by ETCs in rural areas. <sup>130</sup> Under the Commission's rules, receipt of high-cost support by Virginia Cellular will not affect the total amount of high-cost support that the incumbent rural telephone company receives. <sup>131</sup> Therefore, to the extent that Virginia Cellular or any future competitive ETC captures incumbent rural telephone company lines, provides new lines to currently unserved customers, or provides second lines to existing wireline subscribers, it will have no impact on the amount of universal service support available to the incumbent rural telephone companies for those lines they continue to serve. <sup>132</sup> Similarly, redefining the service areas of the affected rural telephone companies will not change the amount of universal service support that is available to these incumbents.
- 44. Third, we find that redefining the rural telephone company service areas as proposed will not require the rural telephone companies to determine their costs on a basis other than the study area level. Rather, the redefinition merely enables competitive ETCs to serve areas that are smaller than the entire ILEC study area. Our decision to redefine the service areas does not modify the existing rules applicable to rural telephone companies for calculating costs on a study area basis, nor, as a practical matter, the manner in which they will comply with these rules. Therefore, we find that the concern of the Joint Board that redefining rural service areas would impose additional administrative burdens on affected rural telephone companies is not at issue here.
- 45. In accordance with section 54.207(d) of the Commission's rules, we submit this order to the Virginia Commission. We request that the Virginia Commission treat this Order as a petition to redefine a service area under section 54.207(d)(1) of the Commission's rules. <sup>134</sup> Virginia Cellular's ETC designation in the service areas of Shenandoah and MGW is subject to the Virginia Commission's review and agreement with the redefinition proposal herein. <sup>135</sup> We

<sup>&</sup>lt;sup>129</sup> See supra para. 35.

<sup>&</sup>lt;sup>130</sup> See Western Wireless Pine Ridge Order, 16 FCC Rcd at 18138-39, para. 15.

<sup>&</sup>lt;sup>131</sup> See RTF Order, 16 FCC Rcd at 11299-11309, paras. 136-164.

<sup>132</sup> See Western Wireless Pine Ridge Order, 16 FCC Rcd at 18138-39, para. 15.

<sup>&</sup>lt;sup>133</sup> 47 C.F.R. § 54.207(d).

<sup>&</sup>lt;sup>134</sup> Virginia Cellular submits that the Commonwealth of Virginia has no process for redefining service areas. *See* Virginia Cellular October 11 Supplement at 2.

<sup>&</sup>lt;sup>135</sup> In the *Universal Service Order*, the Commission decided to minimize any procedural delays caused by the need for the federal-state coordination on redefining rural service areas. *See Universal Service Order*, 12 FCC Rcd at 8880-81, para. 187. Therefore, the Commission adopted section 54.207 of the Commission's rules by which the state commissions may obtain agreement of the Commission when proposing to redefine a rural service area. *Id.* at 8881, para. 188. Similarly, the Commission adopted a procedure in section 54.207 to address the occasions when the Commission seeks to redefine a rural service area. *Id.* The Commission stated that "in keeping with our intent

find that the Virginia Commission is uniquely qualified to examine the redefinition proposal because of its familiarity with the rural service areas in question. Upon the effective date of the agreement of the Virginia Commission with our redefinition of the service areas of Shenandoah and MGW, our designation of Virginia Cellular as an ETC for these areas as set forth herein shall also take effect. In all other areas for which this Order grants ETC status to Virginia Cellular, as described herein, such designation is effective immediately. If, after its review, the Virginia Commission determines that it does not agree with the redefinition proposal herein, we will reexamine Virginia Cellular's petition with regard to redefining the affected rural service areas.

### F. Regulatory Oversight

We note that Virginia Cellular is obligated under section 254(e) of the Act to use 46. high-cost support "only for the provision, maintenance, and upgrading of facilities and services for which support is intended" and is required under sections 54.313 and 54.314 of the Commission's rules to certify annually that it is in compliance with this requirement. <sup>136</sup> Separate and in addition to its annual certification filing under sections 54.313 and 54.314 of our rules, Virginia Cellular has committed to submit records and documentation on an annual basis detailing its progress towards meeting its build-out plans in the service areas it is designated as an ETC. 137 Virginia Cellular also has committed to become a signatory to the Cellular Telecommunications Industry Association's Consumer Code for Wireless Service and provide the number of consumer complaints per 1,000 mobile handsets on an annual basis. <sup>138</sup> In addition, Virginia Cellular will annually submit information detailing how many requests for service from potential customers in the designated service areas were unfulfilled for the past year. 139 We require that Virginia Cellular submit these additional data to the Commission and USAC on October 1 of each year beginning October 1, 2004. We find that reliance on Virginia Cellular's commitments is reasonable and consistent with the public interest and the Act and the Fifth Circuit decision in Texas Office of Public Utility Counsel v. FCC. 141 We conclude that fulfillment of these additional reporting requirements will further the Commission's goal of ensuring Virginia Cellular satisfies its obligation under section 214(e) of the Act to provide

to use this procedure to minimize administrative delay, we intend to complete consideration of any proposed definition of a service area promptly." *Id.* 

<sup>&</sup>lt;sup>136</sup> 47 U.S.C. § 254(e); 47 C.F.R. §§ 54.313, 54.314.

<sup>&</sup>lt;sup>137</sup> See Virginia Cellular November 12 Supplement at 4-5.

<sup>&</sup>lt;sup>138</sup> See supra para. 30; Virginia Cellular November 12 Supplement at 1.

<sup>139</sup> See supra para. 15; Virginia Cellular November 12 Supplement at 2.

<sup>&</sup>lt;sup>140</sup> Virginia Cellular's submissions concerning consumer complaints per 1,000 handsets and unfulfilled service requests will include data from July 1 of the previous calendar year through June 30 of the reporting calendar year. We anticipate that Virginia Cellular's annual submission will only encompass the service areas where it is designated as an ETC.

<sup>&</sup>lt;sup>141</sup> Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393, 417-18 (5<sup>th</sup> Cir. 1999) In TOPUC v. FCC, the Fifth Circuit held that that nothing in section 214(e)(2) of the Act prohibits states from imposing additional eligibility conditions on ETCs as part of their designation process. See id. Consistent with this holding, we find that nothing in section 214(e)(6) prohibits the Commission from imposing additional conditions on ETCs when such designations fall under our jurisdiction.

supported services throughout its designated service area. We adopt the commitments that Virginia Cellular has made as conditions on our approval of its ETC designation for the Commonwealth of Virginia. We note that the Commission may institute an inquiry on its own motion to examine any ETC's records and documentation to ensure that the high-cost support it receives is being used "only for the provision, maintenance, and upgrading of facilities and services" in the areas where it is designated as an ETC. Virginia Cellular will be required to provide such records and documentation to the Commission and USAC upon request. We further emphasize that if Virginia Cellular fails to fulfill the requirements of the statute, our rules, and the terms of this Order after it begins receiving universal service support, the Commission has authority to revoke its ETC designation. The Commission also may assess forfeitures for violations of Commission rules and orders.

#### IV. ANTI-DRUG ABUSE ACT CERTIFICATION

47. Pursuant to section 5301 of the Anti-Drug Abuse Act of 1988, no applicant is eligible for any new, modified, or renewed instrument of authorization from the Commission, including authorizations issued pursuant to section 214 of the Act, unless the applicant certifies that neither it, nor any party to its application, is subject to a denial of federal benefits, including Commission benefits. Virginia Cellular has provided a certification consistent with the requirements of the Anti-Drug Abuse Act of 1988. We find that Virginia Cellular has satisfied the requirements of the Anti-Drug Abuse Act of 1988, as codified in sections 1.2001-1.2003 of the Commission's rules.

#### V. ORDERING CLAUSES

- 48. Accordingly, IT IS ORDERED that, pursuant to the authority contained in section 214(e)(6) of the Communications Act, 47 U.S.C. § 214(e)(6), Virginia Cellular, LLC IS DESIGNATED AN ELIGIBLE TELECOMMUNICATIONS CARRIER for specified portions of its licensed service area in the Commonwealth of Virginia subject to the conditions described herein. <sup>147</sup>
- 49. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 214(e)(5) of the Communications Act, 47 U.S.C. § 214(e)(5), and sections 54.207(d) and (e) of the Commission's rules, 47 C.F.R. §§ 54.207(d) and (e), the request of Virginia Cellular, LLC to redefine the service areas of Shenandoah Telephone Company and MGW Telephone Company in Virginia IS GRANTED, SUBJECT TO the agreement of the Virginia State Corporation Commission with the Commission's redefinition of the service areas for these rural telephone companies. Upon the effective date of the agreement of the Virginia State Corporation

<sup>&</sup>lt;sup>142</sup> 47 U.S.C. §§ 220, 403; 47 C.F.R. §§ 54.313, 54.314.

<sup>&</sup>lt;sup>143</sup> See Declaratory Ruling, 15 FCC Rcd at 15174, para. 15. See also 47 U.S.C. § 254(e).

<sup>144</sup> See 47 U.S.C. § 503(b).

<sup>&</sup>lt;sup>145</sup> 47 U.S.C. § 1.2002(a); 21 U.S.C. § 862.

<sup>&</sup>lt;sup>146</sup> Virginia Cellular Petition at 18. *See also* Supplement to Virginia Cellular, LLC Petition for Designation as an ETC in the Commonwealth of Virginia, filed February 28, 2003.

<sup>&</sup>lt;sup>147</sup> See supra para. 46.

Commission with the Commission's redefinition of the service areas for those rural telephone companies, this designation of Virginia Cellular, LLC as an ETC for such areas as set forth herein shall also take effect.

- 50. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 214(e)(5) of the Communications Act, 47 U.S.C. § 214(e)(5), and sections 54.207(d) and (e) of the Commission's rules, 47 C.F.R. §§ 54.207(d) and (e), the request of Virginia Cellular, LLC to redefine the service area of NTELOS Telephone Inc. in Virginia IS DENIED.
- 51. IT IS FURTHER ORDERED that a copy of this Memorandum Opinion and Order SHALL BE transmitted by the Office of the Secretary to the Virginia State Corporation Commission and the Universal Service Administrative Company.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch Secretary

#### APPENDIX A

# VIRGINIA NON-RURAL WIRE CENTERS FOR INCLUSION IN VIRGINIA CELLULAR'S ETC SERVICE AREA

Bell Atlantic (Verizon)	GTE South, Inc. (Verizon)
Staunton (STDRVASD)*	Broadway
Staunton (STTNVAST)	Edom
Staunton (STTNVAVE)	Hinton
Craigsville	Dayton
Lovingston (NLFRVANF)	Keezletown
Lovingston (LVTNVALN)	Harrisonburg
Lovingston (WNTRVAWG)	McGaheysville
Greenwood	Bridgewater
Pine River	Weyerscave
	Grottoes
	Elkton
	Amherst
	Gladstone

<sup>\*</sup>Because the wire center locality names are the same in some instances, the Wire Center Codes are listed in parentheses.

#### APPENDIX B

# VIRGINIA RURAL TELEPHONE COMPANY STUDY AREAS FOR INCLUSION IN VIRGINIA CELLULAR'S ETC SERVICE AREA

New Hope Telephone Company

North River Telephone Company

Highland Telephone Cooperative

#### APPENDIX C

### VIRGINIA RURAL TELEPHONE COMPANY WIRE CENTERS FOR INCLUSION IN VIRGINIA CELLULAR'S ETC SERVICE AREA

### **Shenandoah Telephone Company**

Bergton

### **MGW Telephone Company**

McDowell

Williamsville

Deerfield

#### SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Federal-State Joint Board on Universal Service; Virginia Cellular, LLC, Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia.

Competition is for rural as well as urban consumers. In this item, we recognize the unique value that mobile services provide to rural consumers by giving added substance to the public interest standard by which we evaluate wireless eligible telecommunications carriers (ETC). At the same time, we reinforce the requirement that wireless networks be ready, willing and able to serve as carriers of last resort to support our universal service goals.

The areas Virginia Cellular proposes to serve are indeed rural — they are areas where retail rates do not cover the cost of providing service and where high-quality wireless service is intermittent or scarce. This decision remains true to the requirement that ETCs must be prepared to serve all customers upon reasonable request and requires them to offer high-quality telecommunications services at affordable rates throughout the designated service area. In this case, Virginia Cellular has documented its proposed use of federal universal service funding and made important commitments to provide high-quality service throughout its designated service area. To ensure that Virginia Cellular abides by its commitments, moreover, we have imposed reporting requirements and, of course, retain the right to conduct audits and other regulatory oversight activities, if necessary.

Despite the importance of making rural, facilities-based competition a reality, we must ensure that increasing demands on the fund should not be allowed to threaten its viability. Incumbent local exchange carriers, competitive local exchange carriers and wireless carriers should have a competitively neutral opportunity to receive universal service funding. Yet determining an effective, equitable and affordable means of balancing competition and universal service goals is no easy task. The Federal-State Joint Board on Universal Service (Joint Board) is now considering a comprehensive record on these issues and plans to provide a recommended decision to us. I urge them to conclude their inquiry as expeditiously as possible in light of the complexity of the issues involved. Once we receive recommendations from the Joint Board, I hope to move quickly to provide much-needed regulatory certainty in this area and to ensure the support necessary to maintain a sustainable, competitively neutral universal service fund.

### SEPARATE STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Federal-State Joint Board on Universal Service; Virginia Cellular, LLC, Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia.

In this Order, the Commission has taken an important (albeit incremental) step toward establishing a more rigorous framework for evaluating ETC applications. When the Commission initially exercised its authority to grant ETC status in areas where state commissions lack jurisdiction, it appeared to regard entry by any new competitor as *per se* consistent with the public interest. While promoting competition is undoubtedly a core goal under the Telecommunications Act of 1996, the use of universal service funding to engender competition where market forces alone cannot support it presents a more complex question. Particularly in rural study areas, where the cost of providing service typically far exceeds retail rates, regulators must carefully consider whether subsidizing the operations of an additional ETC promotes the public interest.

The Joint Board is developing comprehensive recommendations on the ETC designation process and the appropriate scope of support, and this isolated case is not an appropriate proceeding in which to make any fundamental changes. Nevertheless, to qualify for support even under our existing rules, I believe that an ETC must be prepared to serve all customers upon reasonable request, and it must offer high-quality services at affordable rates throughout the designated service area. State commissions exercising their authority under section 214(e)(2), and this Commission acting pursuant to section 214(e)(6), therefore should make certain that an applicant for ETC status is ready, willing, and able to serve as a carrier of last resort and is otherwise prepared to fulfill the goals set forth in section 254 of the Act.

To this end, I am pleased that the Commission has required Virginia Cellular to submit build-out plans to document its proposed use of federal universal service funding for infrastructure investment. I also support the Commission's insistence on appropriate service-quality commitments. Moreover, the Commission is right to consider the increasing demands on the universal service fund: While at one point the cost of granting ETC status to new entrants may have appeared trifling, the dramatic rate of growth in the flow of funds to competitive ETCs compels us to consider the overall impact of new ETC designations on the stability and sustainability of universal service. Finally, I strongly support our efforts to beef up regulatory oversight by imposing reporting requirements on Virginia Cellular and by reserving the right to conduct audits and revoke this ETC designation in the event of a failure to fulfill the requirements of the statute and this Order. All of these requirements are consistent with the statutory framework. The Joint Board may soon recommend that this Commission and state commissions impose additional requirements, and I eagerly await the outcome of that proceeding.

### SEPARATE STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: Federal-State Joint Board on Universal Service; Virginia Cellular, LLC, Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia.

Today we grant Virginia Cellular eligible telecommunication carrier (ETC) status in study areas served by rural and non-rural telephone companies. We make some headway in this decision toward articulating a more rigorous template for review of ETC applications. Although I support this grant, I believe that the ETC process needs further improvement. The long-term viability of universal service requires that the Commission get the ETC designation process right. We must give serious consideration to the consequences that flow from using the fund to support multiple competitors in truly rural areas. And when we do fund competition, we need to ensure that we provide the appropriate level of support. For these reasons, I look forward to reviewing the Joint Board's upcoming Recommendation on universal service portability and ETC designation. I am hopeful that this document will lay the foundation for an improved approach that both honors the public interest and reflects the realities of the market.

### SEPARATE STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN

Re: Federal-State Joint Board on Universal Service; Virginia Cellular, LLC, Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia.

Late last year, I had the opportunity to further outline my thoughts on the Commission's eligible telecommunications carrier (ETC) designation process and the role of the public interest in that process. For the reasons discussed at that time, I am pleased to support this Order responding to the petition of Virginia Cellular, LLC to be designated as an ETC in the Commonwealth of Virginia. I believe this Order establishes a better template for the ETC designation process that is a significant improvement from past Commission decisions and that more fully embraces the statutory public interest mandate. I expect that state commissions also will find the template that we adopt here to be useful in their deliberations of ETC requests.

I am confident that this Order remains true to the Communications Act, which, through Universal Service, requires the Commission to ensure that all Americans, whoever they are or wherever they live, have access to a rapid and efficient communications system at reasonable rates. Congress clearly intended that, when appropriate, competitive carriers should have access to high cost funds on a technologically neutral basis. I believe the Federal-State Joint Board on Universal Service (Joint Board) can play a critical role in determining the parameters of where such competition is appropriate. I am pleased, however, that this Commission has been willing to strengthen the public interest test, pending a Joint Board recommendation. The template established in this Order provides a much more stringent examination of the public interest in making our ETC determination. Among other factors, Virginia Cellular has made significant investment and service quality commitments throughout its proposed service areas. Finally, I believe that our Order conducts a thorough and proper analysis of rural telephone company service areas pursuant to Section 214(e)(5). Indeed, we ultimately decided not to designate Virginia Cellular as an ETC in certain portions of its licensed service area. In other areas, it was determined, based on a detailed review of the affected service areas, that cream skimming or other similar concerns do not arise, and these areas ultimately are proposed for redefinition.

I look forward to working with my colleagues both at the Commission and on the Joint Board to provide further guidance on the ETC designation process and other Universal Service support issues in the upcoming months. As I outlined in the attached remarks, I believe there are many constructive actions we can take to make sure our Universal Service mandate is upheld while still ensuring that the fund does not grow dramatically.

<sup>&</sup>lt;sup>1</sup> Commissioner Jonathan S. Adelstein, *Accessing the Public Interest: Keeping America Well-Connected*, Address Before the 21st Annual Institute on Telecommunications Policy & Regulation (Dec. 4, 2003) (<a href="http://www.fcc.gov/commissioners/adelstein/speeches2003.html">http://www.fcc.gov/commissioners/adelstein/speeches2003.html</a>). A copy of the remarks is incorporated into this statement.

## Remarks of Jonathan S. Adelstein Commissioner, Federal Communications Commission

"Accessing the Public Interest:
Keeping America Well-Connected"
21st Annual Institute on Telecommunications Policy & Regulation
The International Trade Center - Washington, DC
December 4, 2003

[As prepared for delivery]

#### I. Introduction

Thank you Henry for that kind introduction.

There is no greater opportunity for someone who has dedicated his whole life to public service than to serve as an FCC Commissioner. My singular goal is to serve the public interest. But sometimes the hardest part is figuring out what that means. It is especially frustrating in the context of communications policy, because we hear so many conflicting views from parties with big stakes in the outcome.

Winston Churchill once described Russia as "a riddle, wrapped in a mystery, inside of an enigma." Similar terms are used to describe the public interest standard of the FCC. As an eternal optimist, I still believe the public interest does exist and can be a meaningful standard. It is our job to figure it out, since Congress referred to it over 100 times in the Communications Act. If we are not sure what it means any given case, it is job number one to figure it out.

Looking back over the past year and across the Commission's broad jurisdiction, I am guided in my public interest determinations by one key principle – that the public interest means securing access to communications for everyone, including those the market may leave behind.

I have tried to address these needs this last year, by protecting people with disabilities, non-English speakers, rural and low-income consumers, and many others. I have looked for opportunities for new entrants and smaller players who are seeking to compete in spectrumbased services and in broadcasting.

Today, I would like to focus on securing access to communications opportunities in three key areas. First, we face an urgent need to establish a new framework to shore up universal service so it can continue to fulfill its function of connecting everyone in this country to the latest telecommunications systems, no matter where they live. Second, we need to expand access to the spectrum so that people can maintain those connections in the increasingly untethered, portable world made possible by advances in wireless technologies. Finally, we need to ensure that communities have access to the broadcast airwaves and local broadcasters remain connected to the communities they serve, even as these broadcasters make the transition to the digital era.

#### II. Universal Service

Just this week, the Commission held an important forum on a development that could revolutionize not only the telephone system as we know it today, but the entire regulatory structure that has grown around it over the last century: Voice over Internet Protocol, or VoIP. As voice traffic is increasingly conveyed in packets, it becomes difficult to distinguish a voice call from e-mail, photos, or video clips sailing over the Internet.

This is one of the most exciting developments in telephony in decades, and promises a new era of competition, new efficiencies, lower prices, and innovative services. But we have to make sure that all consumers can benefit from the promises that VoIP may hold.

At Monday's forum, we kept coming back to the question of what that means for the future of universal service. The Communications Act requires that, through Universal Service, the Commission ensure that all Americans, whoever they are or wherever they live, have access to a rapid and efficient, communications system at reasonable rates. VoIP presents a long-term challenge to the current structure of the Universal Service program.

Yet, the system is already under increasing pressures as it is financed by interstate revenues -a declining source of funding - while new demands are being placed on it by competitive providers, and by those carriers that are trying to invest in upgrading their networks. This is the imminent crisis we must address now.

One area of concern is the growth of new entrants that are receiving universal service funding. Although the amount of funding these carriers receive is not yet that large, it is growing rapidly. The Act provides that only eligible telecommunications carriers, or ETCs, can receive Universal Service support. State commissions have the primary responsibility for designating ETCs, and can designate additional carriers, known as competitive ETCs or CETCs. In some cases, the FCC evaluates requests for these additional carriers because the states do not have the authority or have chosen not to use it.

This ETC process has raised a lot of questions from those who are concerned that many States and the FCC began using universal service to "create" competition in areas that could barely support just one provider, let alone multiple providers. They question if this is what Congress intended.

Reading the Act, it is safe to assume that Congress did intend that multiple carriers would have access to universal service. Otherwise, it would not have given the authority to designate additional carriers for eligibility. But it is not clear that Congress fully contemplated the impact of this growing competition on the ability of the fund to keep up with demand, and eventually to support advanced services. It may come down to a choice Congress never envisioned between financing competition or financing network development that will give people in Rural America access to advanced services like broadband.

But Congress did give some very clear direction we cannot ignore. The law requires that the designation of an additional ETC in a service area, both rural and non-rural, must be consistent

with the public interest. And it established an even higher level of review for those areas served by rural carriers. In those rural areas, the law requires that the authorizing agency shall find that the designation is in the public interest.

#### a. ETC Designation Template

That is why I have been working with my colleagues to establish a better template that appropriately embraces this public interest mandate.

Under this approach, competition alone cannot satisfy the public interest analysis. We must weigh other factors in determining whether the benefits exceed the costs. For example, we must increase oversight to ensure that universal service funds are actually being invested in the network for which funding is received. We should weigh the overall impact on the Universal Service Fund. And we should also assess the value of the provider's service offering. We must consider whether the applicant has made a service quality commitment or will provide essential services in its community. This is particularly important, as providers that gain ETC status may some day serve as their customers' only connection, so they must work well.

I will recommend that the Commission use this analysis whenever it reviews an ETC request.

#### b. The Gregg Benchmark Proposal

In response to these concerns, Joint Board member Billy Jack Gregg has suggested that there are certain areas where financing a competitor is simply not a proper use of universal service funds. He proposed that in areas where the high cost carrier receives more than \$30 per line, we should limit funding to only one ETC. In areas where the funding per line is between \$20-\$30, then we should permit no more than two ETCs. And in areas with less than \$20 per line in funding there would be no limit on the number of ETCs. These benchmarks could be challenged and overridden on a case-by-case basis with specific evidence.

Although this proposal needs further discussion, it has a lot of merit. The High Cost Fund ensures that end users in high cost, mostly rural, areas will have access to quality services at reasonable rates. Universal service funding became necessary in these areas because the costs of service were prohibitively high and without it, many would not have had access to telecommunications service at all. Yet, we now fund more than one carrier in several of these same high cost areas.

Mr. Gregg's proposal may allow us to move back toward the initial concept of the High-Cost Fund. Maybe the public interest is better served by ensuring that we use that fund to build out and advance the network in the highest cost areas rather than funding competitive ventures there.

This proposal would help to limit and better control the growth of the fund.

#### c. Primary Lines

Some are suggesting that a way to control costs is to fund only the primary lines. I believe that this would deny consumers the full support Congress intended. Universal service is not about one connection per household – it encompasses that concept, but is not limited by it. The Low-Income fund ensures at least one connection per household. But the High-Cost Fund embraces the concept of network development and support so that all Americans have access to comparable services at comparable rates, eventually evolving to advanced services.

Basing support solely on primary lines is likely to reduce network investment. It also will have severe implications for consumers who use second lines for fax machines or dial-up access to the Internet. This could have disastrous results for small businesses that operate in rural areas. Their telecommunications costs could easily become too expensive to continue affording services. This could undercut rural economic development and severely damage the economy in Rural America.

So I will not support restricting funding to primary lines only. There are other, better options for addressing the growth of the fund, such as the steps I already have outlined.

#### d. Basis of Support

Another way to better control the size of the fund and be true to our Congressional mandate is to make sure to provide the right level of support. Currently, competitive ETCs receive the same per line amount of funding as the incumbent local exchange carrier or ILECs. If the ILEC is rural, then its universal service funding is based on its own costs. That means the funds received by the competitive carriers are based on the rural ILECs' costs, not their own.

A large number of CETCs are wireless carriers. Wireline and wireless carriers provide different types of services and operate under different rules and regulations. Their cost structures are not the same. To allow a wireless CETC to receive the same amount of funding as the wireline carrier, without any reference to their cost structures, is artificial, not to mention clearly inconsistent with Section 254(e).

Section 254(e) requires that all carriers receiving Universal Service funding use that support "only for the provision, maintenance, and upgrading of facilities and services for which that support is intended." I believe the law compels us to change the basis on which we provide support to competitors.

#### III. Managing Spectrum in the Public Interest

When thinking about the federal role in ensuring access to the latest technologies, the Commission is also charged with managing the nation's spectrum in the public interest. Spectrum is the lifeblood of innovations that provide so many new services that people are demanding.

As some of you may know, I have set out an approach for spectrum policy that I call a "Framework for Innovation." In dealing with the spectrum, I believe the Commission should establish ground rules for issues such as interference and availability. But, to the greatest extent possible, we should let innovation and the marketplace drive the development of spectrum-based services. My goal is to maximize the amount of communications and information that flow over the Nation's airwaves, on earth and through space.

Spectrum is a finite public resource. And in order to improve our country's use of it, we need to improve access to spectrum-based services. We cannot afford to let spectrum lie fallow. It is not a property right, but a contingent right to use a public resource – it should be put to use for the benefit of as many people as possible.

I remain concerned that we need to do more to get spectrum in the hands of people who are ready and willing to use it. That is why I am taking a fresh look at our service and construction rules to ensure that our policies do not undercut the ability of carriers to get access to unused spectrum — whether they are in underserved areas or have developed new technologies. For example, we need to adopt tough but fair construction requirements to ensure that spectrum is truly being put to use. This was the case in our decision earlier this year to shorten the construction period for the MVDDS service from ten years to five.

Improved access to spectrum is also the reason why I pushed for our relatively unique service rules for the 70/80/90 GHz bands, which can provide for fiber-like first and last mile connections. This makes it easier for all licensees to get access to spectrum for Gigabit-speed broadband.

While I continue to support the use of auctions, Section 309(j)(6) of the Act recognizes that the public interest is not always served by adopting a licensing scheme that creates mutual exclusivity. Because of the unique sharing characteristics of the 70/80/90 GHz bands, we had an opportunity here to break that mold, and I am glad we did.

I have repeatedly said the FCC needs to improve access to spectrum by those providers who want to serve rural areas, particularly community-based providers. That is why I pushed for the inclusion of both Economic Areas as well as RSA licenses in our recent Advanced Wireless Services Order. Large license areas can raise auction prices so high that many companies that want to serve smaller areas cannot even afford to make a first bid. I certainly recognize that there is value in offering larger service areas for economies of scale and to facilitate wider area deployments. But the public interest demands that we find a balance in developing a band plan, and I am very pleased we did so in that item.

But I am not sure we are doing enough in this area. We heard last month at our wireless ISP forum that operators across the country need access to more spectrum. More spectrum can drive broadband deployment deeper and farther into rural America. We have to be more creative with a term I will coin "spectrum facilitation." That means stripping away barriers, regulatory or economic, to get spectrum into the hands of operators serving consumers at the most local levels.

For example, I was very pleased to support new guidelines to facilitate a more robust secondary market. We removed significant obstacles and provided a framework for allowing licensees to lease spectrum more easily, while ensuring that the Commission does not lose ultimate control over the spectrum. In doing so, we move closer to achieving our goal of ensuring that all Americans have access to the latest wireless technologies, no matter where they live.

The mobile wireless industry is marked by dynamic competition — due in no small part to the regulatory framework that the Commission initially adopted. In the future, we should continue to apply only those rules that truly benefit the public interest so as to avoid undermining these healthy competitive conditions.

For example, I was very pleased that this summer we took significant steps toward improving access to digital mobile wireless phones by those Americans who use hearing aids. We stepped in where the market did not step up. I can think of no more an appropriate action for a government agency to take.

Similarly, there is no higher priority for us at the Commission than improving E911 service. Every day, we confront issues that can affect millions of dollars; but nothing we do is more important than emergency response services. Unlike a lot of issues that get so much attention, this literally is a matter of life or death.

During the last year, the Commission has really stepped up its work with all stakeholders to accelerate the deployment of wireless E911. Continued success requires the unprecedented cooperation of such a wide range of players – the FCC, wireless carriers, public safety answering points, equipment and technology vendors, local exchange carriers, state commissions, and local governments. We all need to work together to get this done quickly and effectively.

Local number portability, or LNP, is another one of the more difficult issues that we faced over the past several months. It truly seemed that everyone in the telecommunications industry hated some part of it. Yet, LNP is one of those issues where the consumer clearly is the winner.

Clearly, there are a number of lingering concerns with LNP and its implementation. Ultimately, though, I believe both the public interest and the law are on our side. And while the concerns raised by both wireline and wireless carriers are significant, and we need to address them, the benefits to consumers outweigh these concerns.

#### IV. Media Diversity

As we saw this past year, Americans are very concerned about their media. The airwaves belong to the American people. Nowhere is it more important for us to preserve access to the airwaves as widely as possible. We should encourage a broad range of voices and viewpoints.

In today's radio and television, we are hearing troubling accounts of pay-for-play that is not being fully disclosed to the listening and viewing public. To the extent these allegations are true, this poses a real threat to the public airwaves. Practices like payola may inhibit the local broadcaster from making independent judgments about the needs of listeners in their community.

This can deny local artists and musicians access to their local airwaves. We need to investigate these allegations and make sure our rules address any troubling practices we identify.

It seems that the transition to digital television is finally upon us. As we move into the new era, we should not abandon our public interest model that sustains localism, competition and diversity. Courts have consistently reaffirmed these priorities as central to the health of our democracy.

We should reaffirm the public interest accountability of our broadcast media. Broadcasters enter into a social compact to use the public airwaves. Broadcasters can now magnify their voice digitally from one channel to say five or six. If triopolies are allowed by the courts, digital can expand three channels to up to eighteen. It is time to examine the public interest obligations of broadcasters on those multiple programming streams. Broadcasting is still a public privilege. Broadcasters must serve the public interest and remain accountable to their local communities for all their programming.

The FCC already has undertaken a number of steps to accelerate the digital transition. As we turn to the few remaining pieces, we should establish comprehensive public interest obligations for the digital era. With respect to carriage, broadcasters make the case that multicast carriage will further localism. If so, there should be no reason why they cannot accept a localism requirement on all their digital program streams that gain the privilege of must-carry.

#### V. Conclusion

As we have seen from the recent media debate, Congress clearly considers the communications industries as far more than makers of widgets. All communications fields involve externalities that are not fully captured in the marketplace. Communications technologies are the way people become informed and participate in society. These technologies bring us up-to-date with our friends and relatives. They educate us with stories, images, and people's creativity. They expand our horizons – from our neighborhoods to our towns and cities, our country, and the world around us. They literally bring the world to our fingertips.

It is the Commission's duty to protect every segment of the public in their access to technologies that convey information necessary to stay well-connected in our society. I look forward to working with all of you, and welcome your ideas on furthering the public interest as we move forward to secure the blessings of modern telecommunications for all of our citizens.

Thank you.

#### DISSENTING STATEMENT OF COMMISSIONER KEVIN J. MARTIN

Re: Federal-State Joint Board on Universal Service; Virginia Cellular, LLC, Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia.

Today's decision designates Virginia Cellular, LLC (Virginia Cellular) as an eligible telecommunications carrier (ETC) in areas served by five rural telephone companies and two non-rural telephone companies in the State of Virginia. The Commission finds the designation of Virginia Cellular as an ETC to be in the public interest and furthers the goals of universal service by "providing greater mobility" and "a choice" of providers in high-cost and rural areas of Virginia. I object to this Order's finding that the goals of universal service are to "provide greater mobility" and "a choice" of providers in rural areas. Rather, I believe the main goals of the universal service program are to ensure that all consumers—including those in high cost areas have access at affordable rates.

During the past two years, I have continued to express my concerns with the Commission's policy of using universal service support as a means of creating "competition" in high cost areas.<sup>2</sup> As I have stated previously, I am hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. The Commission's policy may make it difficult for any one carrier to achieve the economies of scale necessary to serve all of the customers in rural areas.

I am troubled by today's decision because the Commission fails to require ETCs to provide the same type and quality of services throughout the same geographic service area as a condition of receiving universal service support. In my view, competitive ETCs seeking universal service support should have the same "carrier of last resort" obligations as incumbent service providers in order to receive universal service support. Adopting the same "carrier of last resort" obligation for all ETCs is fully consistent with the Commission's existing policy of competitive and technological neutrality amongst service providers.

First, today's decision fails to require CETCs to provide equal access. Equal access provides a direct, tangible consumer benefit that allows individuals to decide which long distance plan, if any, is most appropriate for their needs. As I have stated previously, I believe an equal access requirement would allow ETCs to continue to offer bundled local and long distance service packages, while also empowering consumers with the ability to choose the best calling plan for their needs.<sup>3</sup>

<sup>2</sup> Separate Statement of Commissioner Kevin J. Martin, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket (No. 00-256)(rel. October, 11, 2002).

<sup>&</sup>lt;sup>1</sup> Order at para. 12.

<sup>&</sup>lt;sup>3</sup> Separate Statement of Commissioner Kevin J. Martin, Federal-State Joint Board on Universal Service, CC Docket No.96-45, (rel. July 10, 2002); Separate Statement of Commissioner Kevin J. Martin, Federal-State Joint Board on Universal Service, FCC 03-170, CC Docket No. 96-45, (rel. July 14, 2003).

Second, the Commission redefines several rural telephone company service areas where Virginia Cellular's proposed service areas do not cover the entire service area of the incumbent rural telephone company. Given the potential for creamskimming, I do not support this redefining of the service areas of incumbent rural telephone companies. The Commission's decision to permit service area redefinition relies solely on an analysis of population densities of the wire centers that Virginia cellular can and cannot serve to determine whether the effects of creamskimming would occur, but fails to justify the decision based upon any cost data to verify whether Virginia Cellular is serving low-cost, high revenue customers in the rural telephone company's area.

Finally, I am concerned that the Commission's decision on Virginia Cellular's application may prejudge the on-going work of the Federal-State Joint Board regarding the framework for high-cost universal service support. Today's decision provides a template for approving the numerous CETC applications currently pending at the Commission, and I believe may push the Joint Board to take more aggressive steps to slow the growth of the universal service fund such as primary line restrictions and caps on the amount of universal service support available for service providers in rural America.

#### Before the Federal Communications Commission Washington, D.C. 20554

In the Matter of	· )	
	)	
Federal State Joint Board on	)	
Universal Service	)	CC Docket No. 96-45
	)	
Cellular South License, Inc.	)	
Petition for Designation as an	)	
Eligible Telecommunications Carrier	)	
Throughout its Licensed Service Area	)	
In the State of Alabama	)	

#### MEMORANDUM OPINION AND ORDER

Adopted: December 3, 2002 Released: December 4, 2002

By the Deputy Chief, Wireline Competition Bureau:

#### I. INTRODUCTION

- 1. In this Order, we grant the petition of Cellular South License, Inc. (Cellular South) to be designated as an eligible telecommunications carrier (ETC) throughout its licensed service area in the state of Alabama pursuant to section 214(e)(6) of the Communications Act of 1934, as amended (the Act). In so doing, we conclude that Cellular South, a commercial mobile radio service (CMRS) carrier, has satisfied the statutory eligibility requirements of section 214(e)(1). Specifically, we conclude that Cellular South has demonstrated that it will offer and advertise the services supported by the federal universal service support mechanisms throughout the designated service area. Consistent with our recent decision addressing a similar request, we find that the designation of Cellular South as an ETC in those areas served by rural telephone companies serves the public interest by promoting competition and the provision of new technologies to consumers in high-cost and rural areas of Alabama.
- 2. Where Cellular South is not licensed to serve an entire study area of a rural telephone company affected by this designation, Cellular South has requested that we redefine the service areas of the affected rural telephone companies by wire center boundary for ETC designation purposes. We recently agreed to a redefinition of the service areas of these rural telephone companies in the *RCC Holdings Order*, subject to agreement by the Alabama Public Service Commission (Alabama

<sup>&</sup>lt;sup>1</sup> Cellular South License, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of Alabama, filed June 4, 2002 (Cellular South Petition).

<sup>&</sup>lt;sup>2</sup> 47 U.S.C. § 214(e)(1).

<sup>3</sup> F. J. J. G. at a Table 1

<sup>&</sup>lt;sup>3</sup> Federal State Joint Board on Universal Service; RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area In the State of Alabama, CC Docket No. 96-45, Memorandum Opinion and Order, DA 02-3181 (rel. Nov. 27, 2002) (RCC Holdings Order).

<sup>&</sup>lt;sup>4</sup> Cellular South Petition at 11-13, Exhibit F (Rural Service Areas Requiring Reclassification Along Wire Center Boundaries). Cellular South's CMRS licensed service area does not completely encompass the service areas of three of the rural telephone companies. *See* Appendix C. In those cases, we designate Cellular South as an ETC for the study areas or portions thereof it is licensed to serve, subject to the Alabama Public Service Commission's agreement to redefine service areas as discussed in Section III.E, *infra*.

Commission) in accordance with applicable Alabama Commission requirements.<sup>5</sup> Accordingly, Cellular South's request is moot.

3. Several parties to this proceeding raise concerns about the nature of high-cost support with regard to competitive ETCs. Such concerns include, for example, questions about the impact on the universal service fund of supporting competitive ETCs, as well as questions about subsidizing multiple lines used by the same subscriber. Although we find that these issues reach beyond the scope of this Order, which designates a particular carrier as an ETC, we recognize that these are important issues regarding universal service high-cost support. We note that the Commission has recently requested the Federal-State Joint Board on Universal Service (Joint Board) to provide recommendations on the Commission's rules relating to high-cost universal service support in study areas in which a competitive ETC is providing service, as well as on the Commission's rules regarding support for second lines."

#### II. BACKGROUND

#### A. The Act

- 4. Section 254(e) of the Act provides that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support." Pursuant to section 214(e)(1), a common carrier designated as an ETC must offer and advertise the services supported by the federal universal service mechanisms throughout the designated service area.
- 5. Section 214(e)(2) of the Act gives state commissions the primary responsibility for performing ETC designations. Section 214(e)(6), however, directs the Commission, upon request, to designate as an ETC accommon carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission. Under section 214(e)(6), upon request and consistent with the public interest, convenience, and necessity, the Commission may, with respect to an area served by a rural telephone company, and shall, in all other cases, designate more than one common carrier as an ETC for a designated service area, so long as the requesting carrier meets the requirements of

<sup>&</sup>lt;sup>5</sup> RCC Holdings Order at paras. 37-42 (redefining the service areas of Butler Telephone Company, Frontier Communications of the South, Inc., and Frontier Communications of Alabama, Inc. such that each wire center is a separate service area). If the Alabama Commission does not agree to the proposal to redefine the affected rural service areas, we will reexamine our decision with regard to redefining these service areas.

<sup>&</sup>lt;sup>6</sup> See Alabama Commission Reply Comments at 2-3, 5-6, 8; Alabama Rural LECs Comments at 15-20; Alabama Rural LECs Reply Comments at 3-9; National Telecommunications Cooperative Association (NTCA) Comments at 4-5, 7-9. See also Letter from Mark D. Wilkerson, Counsel for the Alabama Rural LECs, to Marlene Dortch, FCC, dated Sept. 5, 2002 (Rural LECs Sept. 5 ex parte).

<sup>&</sup>lt;sup>7</sup> Federal-State Joint Board on Universal Service, CC Docket 96-45, FCC 02-307, Order (rel. Nov. 8, 2002).

<sup>&</sup>lt;sup>8</sup> 47 U.S.C. § 254(e).

<sup>9 47</sup> U.S.C. § 214(e)(1).

<sup>&</sup>lt;sup>10</sup> 47 U.S.C. § 214(e)(2). See also Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12255, para. 93 (2000) (Twelfth Report and Order).

<sup>&</sup>lt;sup>11</sup> 47 U.S.C. § 214(e)(6). See, e.g., Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota, CC Docket No. 96-45, Memorandum Opinion and Order, 16 FCC Rcd 18133 (2001) (Western Wireless Pine Ridge Order); Federal-State Joint Board on Universal Service; Pine Belt Cellular, Inc. and Pine Belt PCS, Inc. Petition for Designation as an Eligible Telecommunications Carrier, CC Docket No. 96-45, Memorandum Opinion and Order, 17 FCC Rcd 9589 (Wireline Comp. Bur. 2002).

section 214(e)(1).<sup>12</sup> Before designating an additional ETC for an area served by a rural telephone company, the Commission must determine that the designation is in the public interest.<sup>13</sup>

#### B. Commission Requirements for ETC Designation and Redefinition of a Service Area

- 6. Filing Requirements for ETC Designation. The Commission delegated authority to perform ETC designations to the Chief of the Wireline Competition Bureau pursuant to section 214(e)(6). An ETC petition must contain the following: (1) a certification and brief statement of supporting facts demonstrating that the petitioner is not subject to the jurisdiction of a state commission; (2) a certification that the petitioner offers or intends to offer all services designated for support by the Commission pursuant to section 254(c); (3) a certification that the petitioner offers or intends to offer the supported services "either using its own facilities or a combination of its own facilities and resale of another carrier's services;" (4) a description of how the petitioner "advertise[s] the availability of [supported] services and the charges therefor using media of general distribution;" and (5) if the petitioner is not a rural telephone company, it must include a detailed description of the geographic service area for which it requests an ETC designation from the Commission. 15
- 7. <u>Twelfth Report and Order</u>. On June 30, 2000, the Commission released the *Twelfth Report and Order* which, among other things, set forth how a carrier seeking ETC designation from the Commission must demonstrate that the state commission lacks jurisdiction to perform the ETC designation. Carriers seeking designation as an ETC for service provided on non-tribal lands must provide the Commission with an "affirmative statement" from the state commission or a court of competent jurisdiction that the carrier is not subject to the state commission's jurisdiction. The requirement to provide an "affirmative statement" ensures that the state commission has had "a specific opportunity to address and resolve issues involving a state commission's authority under state law to regulate certain carriers or classes of carriers."
- 8. Redefinition of a Service Area. Under section 214(e)(5), "[i]n the case of an area served by a rural telephone company, 'service area' means such company's 'study area' unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company." Section 54.207(d) permits the Commission to initiate a proceeding to consider a definition of a service area that is different from a rural telephone company's study area as long as the Commission seeks agreement on the new definition with the applicable state commission. Under section 54.207(d)(1), the

<sup>12 47</sup> U.S.C. § 214(e)(6).

<sup>&</sup>lt;sup>13</sup> *Id*.

<sup>&</sup>lt;sup>14</sup> Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, Public Notice, 12 FCC Rcd 22947, 22948 (1997). The Wireline Competition Bureau was previously known as the Common Carrier Bureau.

<sup>&</sup>lt;sup>15</sup> Id. at 22948-49. See also Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling, CC Docket No. 96-45, 15 FCC Rcd 15168 (2000) (Declaratory Ruling), recon. pending.

<sup>&</sup>lt;sup>16</sup> See Twelfth Report and Order, 15 FCC Rcd at 12255-65, paras. 93-114.

<sup>&</sup>lt;sup>17</sup> Twelfth Report and Order, 15 FCC Rcd at 12255, para. 93. The Commission defined an "affirmative statement" as "any duly authorized letter, comment, or state commission order indicating that [the state commission] lacks jurisdiction to perform the designation over a particular carrier." *Id.* at 12264, para. 113.

<sup>&</sup>lt;sup>18</sup> Id. (citations omitted).

<sup>19 47</sup> U.S.C. § 214(e)(5).

<sup>&</sup>lt;sup>20</sup> See 47 C.F.R. § 54.207(d)-(e). Any proposed definition will not take effect until both the Commission and the state commission agree upon the new definition. See 47 C.F.R. § 54.207(d)(2). Cellular South states in its petition

Commission must petition a state commission with the proposed definition according to that state commission's procedures.<sup>21</sup> In that petition, the Commission must provide its proposal for redefining the service area and its decision presenting reasons for adopting the new definition, including an analysis that takes into account the recommendations of the Joint Board.<sup>22</sup> When the Joint Board recommended that the Commission retain the current study areas of rural telephone companies as the service areas for such companies, the Joint Board made the following observations: (1) the potential for "creamskimming" is minimized by retaining study areas because competitors, as a condition of eligibility, must provide services throughout the rural telephone company's study area; (2) the Telecommunications Act of 1996 (1996 Act), in many respects, places rural telephone companies on a different competitive footing from other local exchange companies, (3) there would be an administrative burden imposed on rural telephone companies by requiring them to calculate costs at something other than a study area level.<sup>23</sup> The Commission delegated authority to the Chief of the Wireline Competition Bureau to redefine service areas.<sup>24</sup>

#### C. Cellular South's Petition

- 9. On June 4, 2002, Cellular South filed with this Commission a petition pursuant to section 214(e)(6) seeking designation as an ETC throughout its licensed service area in the state of Alabama.<sup>25</sup> Cellular South contends that the Alabama Commission has issued an "affirmative statement" that the Alabama Commission does not have jurisdiction to designate a CMRS carrier as an ETC. Accordingly, Cellular South asks the Commission to exercise jurisdiction and designate Cellular South as an ETC pursuant to section 214(e)(6).<sup>26</sup> Cellular South also maintains that it satisfies the statutory and regulatory prerequisites for ETC designation, and that designating Cellular South as an ETC will serve the public interest.<sup>27</sup>
- 10. Cellular South also requests the Commission to redefine the service areas of three rural telephone companies because it is not able to serve the entire study areas of these companies.<sup>28</sup> Cellular South states that as a wireless carrier it is restricted to providing service only in those areas where it is

that it may be designated as an ETC once the Commission redefines service areas in accordance with section 54.207(c) of the Commission's rules. See Cellular South Petition at 10. Because section 54.207(c) contemplates a situation where a state commission has proposed a new service area definition, we do not act pursuant to section 54.207(c) in this instance. Instead, we will consider Cellular South's request to redefine service areas under section 54.207(d) of the Commission's rules.

<sup>&</sup>lt;sup>21</sup> See 47 C.F.R. § 54.207(d)(1). We note that the state of Alabama has stated that it has no process for redefining service areas. See RCC Holdings Order at para. 8, n.22 (citing Supplement to RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of Alabama, filed August 26, 2002 at 1).

<sup>&</sup>lt;sup>22</sup> See 47 C.F.R. § 54.207(d)(1).

<sup>&</sup>lt;sup>23</sup> See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Recommended Decision, 12 FCC Rcd 87, 179-80, paras. 172-74 (1996) (Recommended Decision).

<sup>&</sup>lt;sup>24</sup> 47 C.F.R. § 54.207(e).

<sup>&</sup>lt;sup>25</sup> See generally Cellular South Petition. On June 21, 2002, the Wireline Competition Bureau released a Public Notice seeking comment on the Cellular South Petition. See Wireline Competition Bureau Seeks Comment on Cellular South License, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of Alabama, CC Docket No. 96-45, Public Notice, 17 FCC Rcd 11887 (2002).

<sup>&</sup>lt;sup>26</sup> Cellular South Petition at 4.

<sup>&</sup>lt;sup>27</sup> Id. at 2, 13.

<sup>&</sup>lt;sup>28</sup> See id. at 11-13, Exhibit F. We note that in its filing, Cellular South is inconsistent in its listing of Frontier Communications of the South, Inc. (Frontier-South) as a separate entity from Frontier Communications of Alabama, Inc. (Frontier-AL). Compare Cellular South Petition at 11 with Cellular South Petition, Exhibit F. We will treat Frontier-South as a separate company from Frontier-AL.

licensed by the Commission.<sup>29</sup> It adds that it is not picking and choosing the lowest cost wire centers of the affected rural telephone companies but instead is basing its requested ETC service area solely on its licensed service area and proposes to serve the entirety of that area.<sup>30</sup> Cellular South maintains that the proposed redefinition of the rural telephone company service areas is consistent with the recommendations regarding rural telephone company study areas set forth by the Joint Board in its Recommended Decision.<sup>31</sup>

#### III. DISCUSSION

11. We find that Cellular South has met all the requirements set forth in sections 214(e)(1) and (e)(6) to be designated as an ETC by this Commission. We conclude that Cellular South has demonstrated that the Alabama Commission lacks the jurisdiction to perform the designation and that the Commission therefore may consider Cellular South's petition under section 214(e)(6). We also conclude that Cellular South has demonstrated that it will offer and advertise the services supported by the federal universal service support mechanisms throughout the designated service area upon designation as an ETC. In addition, we find that the designation of Cellular South as an ETC in those areas served by rural telephone companies serves the public interest by promoting competition and the provision of new technologies to consumers in high-cost and rural areas of Alabama. Pursuant to our authority under section 214(e)(6), we therefore designate Cellular South as an ETC throughout its licensed service area in the state of Alabama. In areas where Cellular South cannot serve the entire study area of a rural telephone company, Cellular South's ETC designation shall be subject to the Alabama Commission's agreement on a new definition for the rural telephone company service areas. In all other areas, as described herein, Cellular South's ETC designation is effective immediately.

#### A. Commission Authority to Perform the ETC Designation

12. We find that Cellular South has demonstrated that the Alabama Commission lacks the jurisdiction to perform the requested ETC designation and that the Commission has authority to consider Cellular South's petition under section 214(e)(6) of the Act. Cellular South submitted as an "affirmative statement" an order issued by the Alabama Commission addressing a petition filed by several CMRS carriers seeking ETC designation or, in the alternative, clarification regarding the jurisdiction of the Alabama Commission to grant ETC status to wireless carriers. In the Alabama Commission Order, the Alabama Commission concluded that it "has no authority to regulate, in any respect, cellular services, broadband personal communications services, and commercial mobile radio services in Alabama." The Alabama Commission advised the petitioners and "all other wireless providers seeking ETC status [to] pursue their ETC designation request with the FCC as provided by 47 U.S.C. § 214(e)(6)." The Alabama Commission's decision in the Alabama Commission Order is consistent with the Code of Alabama and a March 2000 declaratory ruling issued by the Alabama Commission.

<sup>&</sup>lt;sup>29</sup> Cellular South Petition at 12.

<sup>&</sup>lt;sup>30</sup> *Id.* at 12.

<sup>&</sup>lt;sup>31</sup> Id. at 11-13. See 47 U.S.C. § 214(e)(5).

<sup>&</sup>lt;sup>32</sup> Cellular South submits that it cannot serve the entire study areas of the following rural telephone companies: Butler Telephone Company (Butler), Frontier-AL, and Frontier-South.

<sup>&</sup>lt;sup>33</sup> See Cellular South Petition, Exhibit A (Alabama Public Service Commission, Pine Belt Cellular, Inc. and Pine Belt PCS, Inc., Order, Docket No. U-4400 at 1-3 (March 12, 2002) (Alabama Commission Order)).

<sup>&</sup>lt;sup>34</sup> Alabama Commission Order at 2 (emphasis in original).

<sup>&</sup>lt;sup>35</sup> *Id*.

<sup>&</sup>lt;sup>36</sup> Id. See generally Alabama Public Service Commission, Bell South Mobility, Inc. Petition for Declaratory Ruling, Order, Docket No. 26414 (March 2, 2000) (Alabama Declaratory Ruling). The Alabama Code definition of

13. We reject the contention of the Alabama Rural LECs that Cellular South has not provided an "affirmative statement" that meets the Commission's requirements found in the *Twelfth Report and Order*.<sup>37</sup> To the contrary, as required by the *Twelfth Report and Order*, the Alabama Commission was given the specific opportunity to address and resolve the issue of whether it has authority to regulate CMRS providers as a class of carriers when it rendered its decision in the *Alabama Commission Order*.<sup>38</sup> We find it sufficient that the Alabama Commission determined that it has no authority to regulate CMRS carriers "in any respect" and that *all* "wireless providers seeking ETC status in Alabama should pursue their ETC designation request with the FCC . . . . ."<sup>39</sup> Furthermore, the Alabama Commission filed comments in this proceeding stating that it does not have regulatory authority over CMRS providers in Alabama.<sup>40</sup> Therefore, based on the record before us, we find that the Alabama Commission lacks jurisdiction to designate Cellular South as an ETC and that we have authority to perform the requested ETC designation in the state of Alabama pursuant to section 214(e)(6).<sup>41</sup>

#### B. Offering and Advertising the Supported Services

14. Offering the Services Designated for Support. We find that Cellular South has demonstrated that it will offer the services supported by the federal universal service support mechanism upon designation as an ETC. We therefore conclude that Cellular South complies with the requirement of section 214(e)(1)(A) to "offer the services that are supported by Federal universal service support mechanisms under section 254(c)." As noted in its petition, Cellular South is a D Block licensee authorized to provide broadband personal communications service (PCS) in the Mobile, Alabama Basic Trading Area (BTA) and a F Block licensee authorized to provide broadband PCS in the Meridian, Mississippi BTA, a significant portion of which is located in western Alabama. Cellular South states that it currently provides all of the services and functionalities enumerated in section 54.101(a) of the Commission's rules throughout its cellular service area in Alabama. Upon designation as an ETC, Cellular South also indicates that it will make available a universal service offering over its wireless network infrastructure using the same facilities it uses to serve its existing customers. Cellular South states that its universal service offering will consist of all of the services supported by the universal

<sup>&</sup>quot;cellular telecommunications services" includes all cellular services, broadband personal communications services and CMRS. *Id.* at 2. *See also* Ala. Code § 40-21-120(1)a (2002). The Alabama Code definition of "cellular telecommunications provider" includes all licensees of the Federal Communications Commission to provide cellular telecommunications services, broadband personal communications services, CMRS, and all resellers of such services. *See Alabama Declaratory Ruling* at 2. *See also* Ala. Code § 40-21-120(1)b (2002).

<sup>&</sup>lt;sup>37</sup> See Alabama Rural LECs Comments at 6-9. The Alabama Rural LECs contend that Cellular South must obtain an order directed to Cellular South rather than rely on language in the *Alabama Commission Order*. See id. at 7.

<sup>&</sup>lt;sup>38</sup> See Twelfth Report and Order, 15 FCC Rcd at 12264, para 113.

<sup>&</sup>lt;sup>39</sup> See Alabama Commission Order at 2.

<sup>&</sup>lt;sup>40</sup> See Alabama Commission Reply Comments at 1.

<sup>&</sup>lt;sup>41</sup> 47 U.S.C. § 214(e)(6). As noted above, the Commission has specifically delegated this authority to the Wireline Competition Bureau.

<sup>&</sup>lt;sup>42</sup> 47 U.S.C. § 214(e)(1)(A). The Commission has defined the services that are to be supported by the federal universal service support mechanisms to include: (1) voice grade access to the public switched network; (2) local usage; (3) Dual Tone Multifrequency (DTMF) signaling or its functional equivalent; (4) single-party service or its functional equivalent; (5) access to emergency services, including 911 and enhanced 911; (6) access to operator services; (7) access to interexchange services; (8) access to directory assistance; and (9) toll limitation for qualifying low-income customers. 47 C.F.R. § 54.101(a).

<sup>&</sup>lt;sup>43</sup> Cellular South Petition at 1. We note that this Order designates Cellular South as an ETC only for a service area within the state of Alabama.

<sup>&</sup>lt;sup>44</sup> *Id*. at 2.

<sup>&</sup>lt;sup>45</sup> Id. at 2. See also Cellular South Petition, Exhibit B (Declaration Regarding Supported Services).

service support mechanism plus Lifeline service.<sup>46</sup> Finally, Cellular South commits to providing its universal service offering to any requesting customer within its designated service area.<sup>47</sup>

- 15. The Alabama Rural LECs raise several concerns about Cellular South's service offerings. We address each of these concerns below, and in so doing, we conclude that Cellular South has demonstrated that it will offer the services supported by the federal universal service support mechanism upon designation as an ETC. As an initial matter, we note that the Commission has previously stated that to require a carrier to actually provide the supported services before it is designated an ETC has the effect of prohibiting the ability of prospective entrants from providing telecommunications service. <sup>48</sup> Instead, "a new entrant can make a reasonable demonstration . . . of its capability and commitment to provide universal service without the actual provision of the proposed service."
- 16. We reject the Alabama Rural LECs' argument that Cellular South does not offer all of the services supported by the federal universal service support mechanisms as required by section 214(e)(1)(A).<sup>50</sup> Specifically, the Alabama Rural LECs claim that Cellular South does not currently provide voice grade service to all areas for which it seeks ETC designation and that Cellular South fails to allege that it is currently providing local usage.<sup>51</sup> In addition, the Alabama Commission states in its comments that "[t]he lack of [wireless] coverage in rural areas also raises serious concerns whether Cellular South presently has, or will acquire in a timely manner, the ability to provide emergency services in all of its rural service territories."<sup>52</sup>
- 17. Although the Alabama Rural LECs' claim that Cellular South should be denied ETC designation because Cellular South does not offer voice grade service to all areas for which it seeks ETC designation, we find that the existence of so-called "dead spots" in Cellular South's network does not preclude us from designating Cellular South as an ETC.<sup>53</sup> For the same reasons, we dismiss the Alabama Commission's concerns regarding Cellular South's ability to provide emergency services.<sup>54</sup> Cellular South has committed to provide all services supported by universal service upon its designation as an ETC.<sup>55</sup> The Commission has determined that a telecommunications carrier's inability to demonstrate that it can provide ubiquitous service at the time of its request for designation as an ETC should not preclude its designation as an ETC.<sup>56</sup> Moreover, Cellular South has committed to improve its network.<sup>57</sup> Cellular South states that it will use any high-cost support it receives "to improve its network and enable

<sup>&</sup>lt;sup>46</sup> Cellular South Petition at 2, 4-8.

<sup>&</sup>lt;sup>47</sup> *Id*. at 2.

<sup>&</sup>lt;sup>48</sup> See Declaratory Ruling, 15 FCC Rcd at 15173-74, paras. 12-14. In the Declaratory Ruling, the Commission stated that "a new entrant cannot reasonably be expected to be able to make the substantial financial investment required to provide the supported services in high-cost areas without some assurance that it will be eligible for federal universal service support." *Id.* at 15173, para. 13.

<sup>&</sup>lt;sup>49</sup> Declaratory Ruling, 15 FCC Rcd at 15178, para. 24.

<sup>&</sup>lt;sup>50</sup> See Alabama Rural LECs Comments at 9-13; Alabama Rural LECs Reply Comments at 2-4.

<sup>&</sup>lt;sup>51</sup> See Alabama Rural LECs Comments at 9-13.

<sup>&</sup>lt;sup>52</sup> Alabama Commission Reply Comments at 4.

<sup>&</sup>lt;sup>53</sup> Alabama Rural LECs Comments at 10.

<sup>&</sup>lt;sup>54</sup> See Alabama Commission Reply Comments at 4.

<sup>&</sup>lt;sup>55</sup> Cellular South Petition at 2, 4, Exhibit B.

<sup>&</sup>lt;sup>56</sup> See Declaratory Ruling, 15 FCC Rcd at 15175, para. 17.

<sup>&</sup>lt;sup>57</sup> Cellular South Reply Comments at 7.

Alabama's rural customers to have a meaningful choice of service providers."58

- 18. In addition, the Commission's rules acknowledge the existence of dead spots.<sup>59</sup> "Dead spots" are defined as "[s]mall areas within a service area where the field strength is lower than the minimum level for reliable service." Section 22.99 of the Commission's rules states that "[s]ervice within dead spots is presumed." Additionally, the Commission's rules provide that "cellular service is considered to be provided in all areas, including dead spots . . . ." Because "dead spots" are acknowledged by the Commission's rules, we are not persuaded by the Alabama Rural LECs that the possibility of dead spots demonstrates that Cellular South is not willing or capable of providing acceptable levels of service throughout its service area.
- 19. We find sufficient Cellular South's showing that it will offer minimum local usage as part of its universal service offering. Accordingly, we dismiss the Alabama Rural LECs' claim that ETC designation should be denied because Cellular South fails to allege that it is currently providing local usage. Although the Commission did not set a minimum local usage requirement, in the *Universal Service Order*, it determined that ETCs should provide some minimum amount of local usage as part of their "basic service" package of supported services. Cellular South states that it will comply with any and all minimum local usage requirements adopted by the FCC. It adds that it will meet the local usage requirement by including a variety of local usage plans as part of a universal service offering. We find that Cellular South's commitment to provide local usage is sufficient. Moreover, contrary to the arguments of the Alabama Rural LECs, Cellular South is not required to provide a detailed description of its planned universal service offerings beyond its commitment to provide, or statement that it is now providing, all of the services supported by the universal service support mechanism.
- 20. Finally, we note that the Alabama Commission expressed concern that Cellular South intends to provide advanced services using high-cost universal service funds. The Alabama Commission states that "[a]dvanced services are not included in the nine core services and functionalities identified by the FCC to be provided or funded through the universal service program." Although the Alabama Commission is correct that the provision of advanced services is not a supported service, the Commission explained in the RTF Order that "use of support to invest in infrastructure capable of providing access to advanced services does not violate section 254(e), which mandates that support be used 'only for the

<sup>&</sup>lt;sup>58</sup> *Id*.

<sup>&</sup>lt;sup>59</sup> See 47 C.F.R. § 22.99.

<sup>&</sup>lt;sup>60</sup> Id.

<sup>&</sup>lt;sup>61</sup> *Id*.

<sup>&</sup>lt;sup>62</sup> 47 C.F.R. § 22.911(b).

<sup>&</sup>lt;sup>63</sup> Alabama Rural LECs Comments at 9-13.

<sup>&</sup>lt;sup>64</sup> See Federal-State Joint Board on Universal Service, CC Docket No, 96-45, Report and Order, 12 FCC Rcd 8776, 8813, para. 67 (1997) (Universal Service Order) (subseq. history omitted). Although the Commission's rules define "local usage" as "an amount of minutes of use of exchange service, prescribed by the Commission, provided free of charge to end users," the Commission has not specified a number of minutes of use. 47 C.F.R. § 54.101(a)(2).

<sup>65</sup> See Cellular South Petition at 6.

<sup>&</sup>lt;sup>66</sup> *Id*.

<sup>&</sup>lt;sup>67</sup> See Alabama Rural LECs Comments at 9-13.

<sup>68</sup> See generally Declaratory Ruling.

<sup>&</sup>lt;sup>69</sup> See Alabama Commission Reply Comments at 5.

<sup>&</sup>lt;sup>70</sup> *Id*.

provision, maintenance, and upgrading of facilities and services for which the support is intended."<sup>71</sup> The Commission determined that "although the high-cost loop support mechanism does not support the provision of advanced services, our policies do not impede the deployment of modern plant capable of providing access to advanced services."<sup>72</sup> Nothing in the record before us suggests that Cellular South intends to use high-cost universal service support in a manner inconsistent with the statute or our rules.

- 21. For these reasons, we find that Cellular South, because it already provides or commits to provide the supported services, has demonstrated its capability and commitment to provide universal service. Moreover, we emphasize that if Cellular South fails to fulfill its ETC obligations after it begins receiving universal service support, the Commission is authorized to revoke its ETC designation. <sup>74</sup>
- 22. Offering the Supported Services Using a Carrier's Own Facilities. We conclude that Cellular South has demonstrated that it satisfies the requirement of section 214(e)(1)(A) that it offer the supported services using either its own facilities or a combination of its own facilities and resale of another carrier's services. Cellular South states that it provides the supported services "using its existing network infrastructure, which includes the same antenna, cell-site, tower, trunking, mobile switching, and interconnection facilities used by the company to serve its existing customers. The find this certification sufficient to satisfy the facilities requirement of section 214(e)(1)(A).
- 23. Advertising the Supported Services. We conclude that Cellular South has demonstrated that it satisfies the requirement of section 214(e)(1)(B) to advertise the availability of the supported services and the charges therefor using media of general distribution.<sup>77</sup> Cellular South certifies that it "will use media of general distribution that it currently employs to advertise its universal service offerings throughout the service areas designated by the Commission." Contrary to the comments filed by the Alabama Rural LECs, we find that this certification satisfies section 214(e)(1)(B). The Alabama Rural LECs suggest that Cellular South must supply proof as to how it intends to comply with the rules requiring an ETC to publicize the availability of its Lifeline and Linkup services. Accordingly, Cellular South will not be required to publicize Lifeline and Linkup until it is designated as an ETC. Therefore, at this time, it is sufficient that Cellular South commits to advertising the supported services using media of general distribution. Moreover, as the Commission has stated in prior decisions, because an ETC receives universal service support only to the extent that it serves customers, we believe that strong economic incentives exist, in addition to the statutory obligation, for an ETC to advertise its universal service

<sup>&</sup>lt;sup>71</sup> Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, CC Docket No. 96-45, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking, CC Docket No. 00-256, Report and Order, 16 FCC Rcd 11244, 11322, para. 200 (2001) (RTF Order), as corrected by Errata, CC Docket Nos. 96-45, 00-256 (Acc. Pol. Div. rel. Jun. 1, 2001), recon. pending.

<sup>&</sup>lt;sup>72</sup> RTF Order, 16 FCC Rcd at 11322, para. 200.

<sup>&</sup>lt;sup>73</sup> See Cellular South Petition, Exhibit B.

<sup>&</sup>lt;sup>74</sup> See Declaratory Ruling, 15 FCC Rcd at 15174, para. 15. See also 47 U.S.C. § 254(e).

<sup>&</sup>lt;sup>75</sup> 47 U.S.C. § 214(e)(1)(A).

<sup>&</sup>lt;sup>76</sup> Cellular South Petition at 8, Exhibit B.

<sup>&</sup>lt;sup>77</sup> 47 U.S.C. § 214(e)(1)(B).

<sup>&</sup>lt;sup>78</sup> Cellular South Petition at 9.

<sup>&</sup>lt;sup>79</sup> See Alabama Rural LECs Comments at 13-14.

<sup>&</sup>lt;sup>80</sup> See id. See 47 C.F.R. §§ 54.405(b) and 54.411(d).

<sup>&</sup>lt;sup>81</sup> See Twelfth Report and Order, 15 FCC Rcd at 12249-50, paras. 76-80.

offering in its designated service area.82

#### C. Public Interest Analysis

- 24. We conclude that it is in the public interest to designate Cellular South as an ETC in Alabama in areas that are served by rural telephone companies.<sup>83</sup> We conclude that Cellular South has made a threshold demonstration that its service offering fulfills several of the underlying federal policies favoring competition and the provision of affordable telecommunications service to consumers.
- 25. We find that the customers in Alabama affected by this designation will benefit from the designation of Cellular South as an ETC.<sup>84</sup> An important goal of the 1996 Act is to open local telecommunications markets to competition.<sup>85</sup> The Commission has held that designation of qualified ETCs promotes competition and benefits consumers by increasing customer choice, innovative services, and new technologies.<sup>86</sup> Competition will allow customers in rural Alabama to choose service based on pricing, service quality, customer service, and service availability. In addition, we find that the provision of competitive service will facilitate universal service to the benefit of consumers in Alabama by creating incentives to ensure that quality services are available at "just, reasonable, and affordable rates." <sup>87</sup>
- 26. We find that the designation of Cellular South as an ETC may provide benefits to rural consumers that are not available from the incumbent carriers. For example, Cellular South submits that it "believes that in all cases its local calling area will be substantially larger [than that of the incumbent carrier], which will reduce intra-LATA toll charges typically associated with wireline service." Also, Cellular South indicates that it will include a variety of local usage plans as part of its universal service offering. The Commission has stated that rural consumers may benefit from expanded local calling areas and an offering of a variety of calling plans because such options may make intrastate toll calls more affordable to those consumers.
- 27. In addition, we conclude that consumers will not be harmed by the designation of Cellular South as an ETC in rural areas in Alabama. We acknowledge that Congress expressed a specific intent to preserve and advance universal service in rural areas as competition emerges. <sup>91</sup> The Commission has indicated that, in establishing a public interest requirement for those areas served by rural telephone companies, Congress was concerned that consumers in rural areas continue to be adequately served should the incumbent carrier exercise its option to relinquish its ETC designation under section

<sup>&</sup>lt;sup>82</sup> See Western Wireless Pine Ridge Order, 16 FCC Rcd at 18137, para. 10.

<sup>83</sup> See 47 U.S.C. § 214(e)(6).

<sup>&</sup>lt;sup>84</sup> See Cellular Telecommunications & Internet Association (CTIA) Comments at 4.

According to the Joint Explanatory Statement, the purpose of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly the private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . . ." Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 458, 104<sup>th</sup> Cong., 2d Sess. at 113 (Joint Explanatory Statement).

<sup>&</sup>lt;sup>86</sup> See Western Wireless Pine Ridge Order, 16 FCC Rcd 18137, para. 12.

<sup>87 47</sup> U.S.C. § 254(b)(1).

<sup>88</sup> Cellular South Petition at 16.

<sup>89</sup> Id. at 6.

<sup>90</sup> See, e.g., Twelfth Report and Order, 15 FCC Rcd at 12237-38, paras. 56-58.

<sup>&</sup>lt;sup>91</sup> 47 U.S.C. § 214(e)(6) (stating that before designating an additional ETC for an area served by a rural telephone company, the Commission shall find that the designation is in the public interest). See also 47 U.S.C. § 254(b)(3).

214(e)(4). 92 Here, however, Cellular South demonstrates both the commitment and ability to provide service to any requesting customer within the designated service area using its own facilities. 93 Thus, there is no reason to believe that consumers in the affected rural areas will not continue to be adequately served should the incumbent carrier seek to relinquish its ETC designation. We find nothing in the record before us to indicate that Cellular South may be unable to satisfy its statutory ETC obligations after designation. In addition, nothing in the record indicates that any of the affected rural telephone companies have intentions of relinquishing their ETC designations.

28. Based on the record before us, we conclude that grant of this ETC designation is consistent with the public interest. The Alabama Commission and the Alabama Rural LECs argue that rural areas will be harmed by competition, particularly where there may be more than one competitive ETC, such as areas served by Butler Telephone Company and Millry Telephone Company, which are also served by the competitive ETC RCC Holdings. Order, Consistent with our recent decision in the RCC Holdings Order, we find that the parties opposing this designation have not presented persuasive evidence to support their contention that designation of an additional ETC in the rural areas at issue will reduce investment in infrastructure, raise rates, reduce service quality to consumers in rural areas or result in loss of network efficiency. The Alabama Rural LECs have merely presented data regarding the number of loops per study area, the households per square mile in their wire centers, and the high-cost nature of low-density rural areas. The evidence submitted is typical of most rural areas and does not, in and of itself, demonstrate that designation of Cellular South as an ETC will harm the affected rural telephone companies or undermine the Commission's policy of promoting competition in all areas, including high-cost areas. Moreover, the federal universal service support mechanisms support all lines served by ETCs in rural and high-cost areas. Under the Commission's rules, Cellular South's receipt of high-cost

<sup>&</sup>lt;sup>92</sup> See Western Wireless Pine Ridge Order, 16 FCC Rcd at 18139, para. 16. We note that even if the incumbent carrier determined that it no longer desired to be designated as an ETC, section 214(e)(4) requires the ETC seeking to relinquish its ETC designation to give advance notice to the Commission. Prior to permitting the ETC to cease providing universal service in an area served by more than one ETC, section 214(e)(4) requires that the Commission "ensure that all customers served by the relinquished carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier." The Commission may grant a period, not to exceed one year, within which such purchase or construction shall be completed. 47 U.S.C. § 214(e)(4).

<sup>&</sup>lt;sup>93</sup> We note, however, that an ETC is not required to provide service using its own facilities exclusively. Section 214(e)(1)(A) allows a carrier designated as an ETC to offer the supported services "either using its own facilities or a combination of its own facilities and resale of another carrier's services." 47 U.S.C. § 214(e)(1)(A).

<sup>&</sup>lt;sup>94</sup> In the service areas of Butler and Millry, Cellular South and RCC Holdings propose to serve the same wire centers. *See* Alabama Commission Reply Comments at 2-3, 8; Alabama Rural LECs Reply Comments at 5-9. *See also RCC Holdings Order*, Appendix C.

<sup>&</sup>lt;sup>95</sup> See RCC Holdings Order at para. 26.

<sup>&</sup>lt;sup>96</sup> See Alabama Commission Reply Comments at 3; NTCA Comments at 5; Alabama Rural LECs Comments at 15; Alabama Rural LECs Reply Comments at 4-5. See Rural LECs Sept. 5 ex parte. In discussing network efficiencies, the Alabama Rural LECs contend that in high-cost, low density areas, there is a loss of efficiency in the network when more than one carrier serves the same territory. The Alabama Rural LECs do not state, however, whether their argument extends to a wireless competitor that provides new lines to unserved customers or second lines to existing customers. See Rural LECs Sept. 5 ex parte at 1, 3-4, and 8-9.

<sup>&</sup>lt;sup>97</sup> For example, although Butler indicates that 71% of its study area contains less than 100 households per square mile and its study area's average density is 10.2 households per square mile, it provides no evidence to show the harm that would come to Butler as a result of Cellular South's ETC designation. *See* Rural LECs Sept. 5 *ex parte* at 2.

<sup>98</sup> See Universal Service Order, 12 FCC Rcd at 8802-03, para. 50.

<sup>&</sup>lt;sup>99</sup> Id.

support will not affect the per-line support amount that the incumbent carrier receives.<sup>100</sup> Therefore, to the extent that Cellular South provides new lines to currently unserved customers, provides second lines to existing wireline subscribers, or captures customers from the existing competitive ETC RCC Holdings, it will have no impact on the amount of universal service support available to the incumbent rural telephone companies for those lines they continue to serve.<sup>101</sup>

- 29. Additionally, consistent with our reasoning in the RCC Holdings Order, <sup>102</sup> we conclude that designation of Cellular South as an ETC does not raise the rural creamskimming concerns alleged by the Alabama Rural LECs and NTCA. <sup>103</sup> Rural creamskimming occurs when competitors seek to serve only the low-cost, high revenue customers in a rural telephone company's study area. <sup>104</sup> In this case, Cellular South, because the contour of its CMRS licensed area differs from the existing rural telephone companies' study areas, will be unable to completely serve the study areas of three rural telephone companies Butler, Frontier-AL, and Frontier-South. Generally, a request for ETC designation for an area less than the entire study area of a rural telephone company might raise concerns that the petitioner will be able to creamskim in the rural study area. <sup>105</sup> In this case, however, Cellular South commits to provide universal service throughout its licensed service area. It therefore does not appear that Cellular South is deliberately seeking to enter only certain areas in order to creamskim.
- 30. We recognize, however, that the lowest cost portions of a rural study area may be the only portions of the affected study area that a wireless carrier is licensed to serve, which theoretically could have an adverse impact on a rural telephone company. NTCA argues that Cellular South should not be designated as an ETC if this is the case. We find, however, that such concerns regarding de facto creamskimming are minimized by the facts in this case. Our analysis of the population data for each of the affected rural wire centers, including the wire centers not covered by Cellular South's licensed service area, reveals that Cellular South will not be serving only the low-cost portions of the affected study areas to the exclusion of high-cost areas. Although there are other factors that define high-cost areas, a low population density typically indicates a high-cost area. Based on the population density information

<sup>&</sup>lt;sup>100</sup> See RTF Order, 16 FCC Rcd at 11299-11309, paras. 136-164.

<sup>&</sup>lt;sup>101</sup> See e.g. Western Wireless Pine Ridge Order, 16 FCC Rcd at 18138-39, para. 15.

<sup>&</sup>lt;sup>102</sup> See RCC Holdings Order at paras. 27-31.

 $<sup>^{103}</sup>$  See Alabama Rural LECs Comments at 15-20; Alabama Rural LECs Reply Comments at 10; NTCA Comments at 4-5.

<sup>&</sup>lt;sup>104</sup> See Recommended Decision, 12 FCC Rcd at 180, para. 172. Creamskimming refers to the practice of targeting only the customers that are the least expensive to serve, thereby undercutting the ILEC's ability to provide service throughout the area. See, e.g., Universal Service Order, 12 FCC Rcd at 8881-2, para. 189.

<sup>&</sup>lt;sup>105</sup> See Recommended Decision, 12 FCC Rcd at 180, para. 172 (stating that potential creamskimming is minimized when competitors, as a condition of eligibility for universal service support, must provide services throughout a rural telephone company's study area).

<sup>106</sup> See NTCA Comments at 4.

<sup>&</sup>lt;sup>107</sup> Using the household count from the 2000 Census, the Alabama Rural LECs filed an *ex parte* providing data on households per square mile in the wire centers of the rural telephone companies. *See* Letter from Mark D. Wilkerson, Counsel for the Alabama Rural LECs, to Marlene Dortch, FCC, dated Sept. 6, 2002 (Rural LECs Sept. 6 *ex parte*).

Local Exchange Carriers and Interexchange Carriers, CC Docket No. 00-256, Second Report and Order and Further Notice of Proposed Rulemaking, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Fifteenth Report and Order, Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation, CC Docket No. 98-77, Report and Order, Prescribing the Authorized Rate of Return From Interstate Services of Local Exchange Carriers, CC Docket No. 98-166, Report and Order, 16 FCC Rcd 19613, 19628, para. 28 (2001) (MAG Order), recon. pending (discussing Rural Task Force White Paper 2 at

submitted in this proceeding, we find that Cellular South will not be serving only areas that are low-cost to the exclusion of high-cost areas. <sup>109</sup> In fact, our analysis reveals that Cellular South is serving many of the higher-cost, lower-density wire centers in the study areas of Butler, Frontier-AL, and Frontier-South. <sup>110</sup> The average population density for areas served by rural carriers is 13 persons per square mile, compared with an average of 105 persons per square mile for areas served by non-rural carriers. <sup>111</sup> Four of the five wire centers that Cellular South proposes to serve in Butler's study area have fewer than 13 households per square mile and two of those five have fewer than 10 households per square mile. Six of the nine wire centers that Cellular South proposes to serve in Frontier-AL's study area have fewer than 10 households per square mile. The four wire centers that Cellular South proposes to service in Frontier-South's study area all have fewer than 10 households per square mile.

- 31. Moreover, another factor that supports our finding that designation of Cellular South as an ETC does not raise rural creamskimming concerns is that Butler, Frontier-AL, and Frontier-South have filed disaggregation and targeting plans with the Alabama Commission and the Universal Service Administrative Company (USAC). 112 In the RTF Order, the Commission determined that support should be disaggregated and targeted below the study area level to eliminate uneconomic incentives for competitive entry caused by the averaging of support across all lines served by a carrier within its study area. 113 Under disaggregation and targeting, per-line support is more closely associated with the cost of providing service. 114 The three rural telephone companies have disaggregated and targeted available support in their study areas to zones at the wire center level, creating "low-cost" zones and "high-cost" zones. Based on our review of their plans, the per-line support available to competitive ETCs in the wire centers located in "low-cost" zones is less than the amount a competitive ETC could receive if it served in one of the wire centers located in the "high-cost" zones. Therefore, the Alabama Commission's concern that disaggregation and targeting support may not limit creamskimming is not supported by the disaggregation data in this case. 115 If Cellular South were to attempt to receive a windfall by serving only the lower cost areas in a disaggregated and targeted service area, it would not succeed because it is limited to receiving the per-line support established by the rural telephone company in a "low-cost" zone. The fact that disaggregation and targeting is in effect for these three rural telephone companies supports our finding that creamskimming is not a concern.
- 32. Finally, we note that several parties express concern about the nature of high-cost support with regard to competitive ETCs. Specifically, several commenters express concern about subsidizing

<sup>&</sup>lt;a href="http://www.wutc.wa.gov/rtf">http://www.wutc.wa.gov/rtf</a>) (stating that "[r]ural carriers generally serve more sparsely populated areas and fewer large, high-volume subscribers than non-rural carriers" and that "[t]he isolation of rural carrier service areas creates numerous operational challenges, including high loop costs, high transportation costs for personnel, equipment, and supplies, and the need to invest more resources to protect network reliability").

<sup>109</sup> See Rural LECs Sept. 6 ex parte.

<sup>&</sup>lt;sup>110</sup> *Id*.

<sup>&</sup>lt;sup>111</sup> See MAG Order, 16 FCC Rcd at 19628, para. 28, n.79.

<sup>112</sup> See USAC: High Cost Disaggregation - Checklist (printed Aug. 13, 2002) at <a href="http://www.universalservice.org/hc/disaggregation/checklist.asp">http://www.universalservice.org/hc/disaggregation/checklist.asp</a>. (USAC Disaggregation Checklist). The USAC Disaggregation plans and indicates which disaggregation paths were chosen by the LECs that filed. The USAC Disaggregation Checklist for Alabama only listed companies that filed disaggregation plans or certified that they did not wish to disaggregate. Incumbent LECs that fail to select a disaggregation path by the deadline set by the Commission are not permitted to disaggregate and target federal high-cost support unless ordered to do so by the state commission. See 47 C.F.R. § 54.315(a).

<sup>&</sup>lt;sup>113</sup> See RTF Order, 16 FCC Rcd at 11302, para. 145.

<sup>&</sup>lt;sup>114</sup> Id.

<sup>&</sup>lt;sup>115</sup> Alabama Commission Reply Comments at 5.

multiple lines of different technologies used by the same subscriber. The Alabama Rural LECs claim that as the number of companies eligible to receive funding increases, the resulting demand on universal service funding could raise the cost of the support mechanisms to an unsustainable level. It is addition, NTCA states that, although the Commission's rules require that a competitive ETC will receive support to the extent it "captures" the subscriber lines of an incumbent local exchange carrier (LEC), it is unclear whether the word "capture" means only instances where the subscriber abandoned the incumbent LEC's service for the competitor's service, or whether it includes instances where the subscriber adds service from the competitor in addition to the incumbent's service. We recognize that these parties raise important issues regarding universal service high-cost support. We find, however, that these concerns are beyond the scope of this Order, which designates a particular carrier as an ETC. We note that the Commission has recently requested the Joint Board to provide recommendations on the Commission's rules relating to high-cost universal service support in study areas in which a competitive ETC is providing service, as well as the Commission's rules regarding support for second lines."

#### D. Designated Service Area

33. We designate Cellular South as an ETC throughout its CMRS licensed service area in the 302 and 292 BTAs. Cellular South is designated an ETC in the areas served by the non-rural carriers BellSouth Telecomm Inc., Contel of the South dba GTE System of the South, and GTE South, Inc., as listed in Appendix A. Cellular South is also designated as an ETC in the areas served by rural telephone companies whose study areas Cellular South is able to serve completely, as listed in Appendix B. We also designate Cellular South as an ETC for portions of three rural telephone company study areas that it is not licensed to serve completely, as listed in Appendix C, subject to the Alabama Commission's agreement on redefining the rural telephone companies' service areas by wire center boundaries.

34. In the RCC Holdings Order, we proposed to redefine by wire center boundary the service areas of several rural telephone companies, including Butler, Frontier-South, and Frontier-AL. <sup>123</sup> In this case, due to the boundaries of Cellular South's CMRS licensed service area in Alabama, however, there will be one rural wire center that Cellular South will not be able to serve completely – the Butler wire

<sup>&</sup>lt;sup>116</sup> See Alabama Commission Reply Comments at 2-3; Alabama Rural LECs Reply Comments at 5-9; NTCA Comments at 8.

<sup>&</sup>lt;sup>117</sup> See Alabama Rural LECs Comments at 16-18; Alabama Rural LECs Reply Comments at 5-9; Rural LECs Sept. 5 ex parte.

<sup>&</sup>lt;sup>118</sup> NTCA Comments at 8. See also 47 C.F.R. § 54.307.

<sup>&</sup>lt;sup>119</sup> Federal-State Joint Board on Universal Service, CC Docket 96-45, FCC 02-307, Order (rel. Nov. 8, 2002).

<sup>120</sup> See Cellular South Petition at 10, Exhibit D. The wire centers in Appendix A only partially served by Cellular South are depicted with the word "partial." We designate Cellular South as an ETC in these partially served wire centers pursuant to sections 214(e)(5) and (e)(6) of the Act. When designating a service area served by a non-rural carrier, the Commission may designate a service area that is smaller than the contours of the incumbent carrier's study area. See Universal Service Order at 8879-80, para. 185 (stating that if a service area were "simply structured to fit the contours of an incumbent's facilities, a new entrant, especially a CMRS-based provider, might find it difficult to conform its signal or service area to the precise contours of the incumbent's area, giving the incumbent an advantage.").

<sup>&</sup>lt;sup>121</sup> See Cellular South Petition at 10, Exhibit E.

<sup>&</sup>lt;sup>122</sup> See Section III.E, infra. We note that the Commission has stated that the level of disaggregation should be considered when determining whether to certify an ETC for a service area other than a rural carrier's entire study area. See RTF Order, 16 FCC Rcd at 11308-9, para. 164. See also para. 32, supra.

<sup>&</sup>lt;sup>123</sup> See RCC Holdings Order at para. 37.

center in Butler's study area.<sup>124</sup> We conclude that it is in the public interest to designate Cellular South as an ETC for the portion of the Butler wire center it is able to serve. Our analysis of the public interest in granting ETC status is not undercut by the partial nature of coverage in this limited instance. Our analysis of the consumer benefits, the potential harm to consumers, and the effect of this ETC designation on rural telephone companies does not change based on Cellular South's ability to serve only a portion of this wire center. The affected consumers in this wire center will benefit from the provision of competitive service. Further, parties have offered no evidence of harm regarding Cellular South's ability to partially serve one of the rural wire centers.

35. We also find that any concern that Cellular South will be creamskimming in the study area of Butler because it can only partially serve the Butler wire center is substantially minimized by the facts in this case. As discussed above, Cellular South seeks ETC designation throughout its licensed service area. Based on our analysis of population density as discussed in Section III.C, it does not appear that Cellular South will be serving only low cost areas to the exclusion of high-cost areas. Because Cellular South is serving all of the high-cost areas in Butler's study area, we find that any creamskimming concerns are substantially minimized. In addition, Butler has disaggregated its study area and therefore, as discussed above in Section III.C, we find that Cellular South's potential to creamskim in this area is substantially minimized. Thus, we conclude that it is in the public interest to designate Cellular South as an ETC in the study areas of Butler.

### E. Redefining Rural Telephone Company Service Areas For Purposes of ETC Designation

36. Cellular South requests that the Commission redefine the service areas of Butler, Frontier-AL, and Frontier South because it is unable to serve the entire study areas of these telephone companies due to the limitations of its wireless service area license. We need not address this request because we recently agreed to redefine the service areas of Butler, Frontier-AL, and Frontier-South in the RCC Holdings Order, such that each wire center is a separate service area. Our redefinition proposal, however, is subject to review and final agreement by the Alabama Commission in accordance with applicable Alabama Commission requirements. Accordingly, the redefinition of the rural telephone company service areas that Cellular South cannot serve completely will be effective on the date that the Alabama Commission agrees with our redefinition, as proposed in the RCC Holdings Order. Cellular South's ETC designation in these areas will be simultaneously effective on that date. In all other areas, as described herein, Cellular South's ETC designation is effective immediately. If after its review the Alabama Commission determines that it does not agree with the redefinition proposed in the RCC Holdings Order, we will reexamine our decision with regard to redefining the affected rural service areas.

#### IV. ANTI-DRUG ABUSE ACT CERTIFICATION

37. Pursuant to section 5301 of the Anti-Drug Abuse Act of 1988, no applicant is eligible for any new, modified, or renewed instrument of authorization from the Commission, including authorizations issued pursuant to section 214 of the Act, unless the applicant certifies that neither it, nor any party to its application, is subject to a denial of federal benefits, including Commission benefits. This certification

<sup>&</sup>lt;sup>124</sup> We note that Cellular South will serve the majority of the Butler wire center. *See* Letter from B. Lynn F. Ratnavale, Counsel for Cellular South License, Inc., to Shannon Lipp, FCC, dated Nov. 14, 2002 (Cellular South Nov. 14 *ex parte*) (attached map).

<sup>125</sup> See Cellular South Petition at 11-13, Exhibit F.

 $<sup>^{126}</sup>$  See RCC Holdings Order at para. 37.

<sup>127</sup> See para. 2, supra.

<sup>&</sup>lt;sup>128</sup> 47 U.S.C. § 1.2002(a); 21 U.S.C. § 862.

must also include the names of individuals specified by section 1.2002(b) of the Commission's rules. <sup>129</sup> Cellular South has provided a certification consistent with the requirements of the Anti-Drug Abuse Act of 1988. <sup>130</sup> We find that Cellular South has satisfied the requirements of the Anti-Drug Abuse Act of 1988, as codified in sections 1.2001-1.2003 of the Commission's rules.

#### V. ORDERING CLAUSES

- 38. Accordingly, IT IS ORDERED that, pursuant to the authority contained in section 214(e)(6) of the Communications Act, 47 U.S.C. § 214(e)(6), and the authority delegated in sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, Cellular South License, Inc. IS DESIGNATED AN ELIGIBLE TELECOMMUNICATIONS CARRIER throughout its licensed service area in the state of Alabama to the extent described herein.
- 39. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 214(e)(5) of the Communications Act, 47 U.S.C. § 214(e)(5), and sections 0.91, 0.291 and 54.207(d) and (e) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 54.207(d) and (e), the request of Cellular South License, Inc. to redefine the service areas of Butler Telephone Company, Frontier Communications of the South, Inc., and Frontier Communications of Alabama, Inc. IS GRANTED PENDING the agreement of the Alabama Public Service Commission with our redefinition of the service areas for those rural telephone companies, see Federal State Joint Board on Universal Service, RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area In the State of Alabama, CC Docket No. 96-45, Memorandum Opinion and Order, DA 02-3181 at para. 37 (rel. Nov. 27, 2002). Upon the effective date of the agreement of the Alabama Public Service Commission with our redefinition of the service areas for those rural telephone companies, our designation of Cellular South License, Inc. as an ETC for such areas as set forth herein shall also take effect.
- 40. IT IS FURTHER ORDERED that a copy of this Memorandum Opinion and Order SHALL BE transmitted by the Wireline Competition Bureau to the Alabama Public Service Commission and the Universal Service Administrative Company.

FEDERAL COMMUNICATIONS COMMISSION

Carol E. Mattey

Deputy Chief, Wireline Competition Bureau

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<sup>129</sup> Section 1.2002(b) provides that a certification pursuant to that section shall include: "(1) If the applicant is an individual, that individual; (2) If the applicant is a corporation or unincorporated association, all officers, directors, or persons holding 5% or more of the outstanding stock or shares (voting/and or non-voting) of the petitioner; and (3) If the applicant is a partnership, all non-limited partners and any limited partners holding a 5% or more interest in the partnership." 47 C.F.R. § 1.2002(b).

<sup>&</sup>lt;sup>130</sup> See Cellular South Petition at 17, Exhibit H (Anti-Drug Abuse Act Certification).

#### APPENDIX A

### ALABAMA NON-RURAL WIRE CENTERS FOR INCLUSION IN CELLULAR SOUTH'S ETC SERVICE AREA

#### BellSouth Telecomm Inc. - AL

Livingston (LVTNALMA)

Demopolis (partial)

(DMPLALMA)

York (YORKALMA)

Thomasville (partial)

(THVLALMA)

Jackson (JCSNALNM)

McIntosh (MCINALMA)

Mt. Vernon (MTVRALMA)

Citronelle (CTRNALNM)

Mobile(MOBLALSA)

Mobile(MOBLALSE)

Mobile(MOBLALPR)

Mobile(MOBLALSH)

Mobile(MOBLALAP)

Mobile(MOBLALSK)

Mobile(MOBLALOS)

Mobile(MOBLALAZ)

violic(iviobe/te/te/

Mobile(MOBLALTH)

Mobile(MOBLALBF)

Mobile(MOBLALSF)

Belle Fontaine (BLFNALMA)

Bay Minette (BYMNALMA)

Fairhope (FRHPALMA)

Evergreen (EVRGALMA)

Brewton (BRTOALMA)

Flomaton (FMTNALNM)

#### BellSouth Telecomm Inc.-MS

Quitman (QTMNMSMA)

#### Contel of the South dba GTE

**System of the South** 

Grand Bay (GDBAALXA)

Irvington (IRSEALXA)

Bayou L. (BLBTALXA)

Fowl River (FWRVALXA)

Dauphin Island (DPISALXA)

Coffeeville (CFVLALXA)

Panola (PANLALXA)

#### GTE South, Inc.

Andalusia (partial) (ANDSALXA)

#### APPENDIX B

### ALABAMA RURAL TELEPHONE COMPANY STUDY AREAS FOR INCLUSION IN CELLULAR SOUTH'S ETC SERVICE AREA

Castleberry Telephone Co.

Gulf Telephone Co.

Millry Telephone Co.

#### APPENDIX C

### ALABAMA RURAL TELEPHONE COMPANY WIRE CENTERS AND PORTIONS THEREOF FOR INCLUSION IN CELLULAR SOUTH'S ETC SERVICE AREA

#### Butler Telephone Company, Inc.

Pennington

Lisman

Butler (Partial)

Needham

Grove Hill

#### Frontier Communications of Alabama, Inc.

Beatrice

Peterman

Finchburg

Gosport

Monroeville

Frisco City

Excel

Repton

Uriah

#### Frontier Communications of the South, Inc.

Vredenburg

McCullough

Huxford

Atmore



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# Before the Federal Communications Commission Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	
Universal Service	. )	CC Docket No. 96-45
	)	•
Western Wireless Corporation	)	
Petition for Designation as an	)	
Eligible Telecommunications Carrier	)	
In the State of Wyoming	)	

#### MEMORANDUM OPINION AND ORDER

Adopted: December 22, 2000 Released: December 26, 2000

By the Common Carrier Bureau:

#### I. INTRODUCTION

1. In this Order, we grant the petition of Western Wireless Corporation (Western Wireless) to be designated as an eligible telecommunications carrier (ETC) in designated service areas within Wyoming pursuant to section 214(e)(6) of the Communications Act of 1934, as amended (the Act). In so doing, we conclude that Western Wireless has satisfied the statutory eligibility requirements of section 214(e)(1). Specifically, we conclude that Western Wireless has demonstrated that it will offer and advertise the services supported by the federal universal service support mechanism throughout the designated service areas. In addition, we find that the designation of Western Wireless as an ETC in those areas served by rural telephone companies serves the public interest by promoting competition and the provision of new technologies to consumers in high-cost and rural areas of Wyoming. We conclude that consumers in Wyoming will benefit as a result of Western Wireless' designation as an ETC.

#### II. BACKGROUND

#### A. The Act

2. Section 254(e) of the Act provides that "only an eligible telecommunications

<sup>&</sup>lt;sup>1</sup> Western Wireless Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming, filed October 25, 1999 (Western Wireless Petition). See 47 U.S.C. § 214(e)(6).

<sup>&</sup>lt;sup>2</sup> 47 U.S.C. § 214(e)(1).

<sup>&</sup>lt;sup>3</sup> 47 U.S.C. § 214(e)(1).

carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support." Section 214(e)(1) requires that a common carrier designated as an ETC must offer and advertise the services supported by the federal universal service mechanisms throughout the designated service area.<sup>5</sup>

3. Pursuant to section 214(e)(2), state commissions have the primary responsibility for designating carriers as ETCs.<sup>6</sup> Section 214(e)(6), however, directs the Commission, upon request, to designate as an ETC "a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State Commission." Under section 214(e)(6), upon request and consistent with the public interest, convenience, and necessity, the Commission may, with respect to an area served by a rural telephone company, and shall, in all other cases, designate more than one common carrier as an ETC for a designated service area, so long as the requesting carrier meets the requirements of section 214(e)(1).<sup>8</sup> Before designating an additional ETC for an area served by a rural telephone company, the Commission must find that the designation is in the public interest.<sup>9</sup> On December 29, 1997, the Commission released a Public Notice establishing the procedures that carriers must use when seeking Commission

A common carrier designated as an eligible telecommunications carrier under [subsections 214(e)(2), (3), or (6)] shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received —

- (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and
- (B) advertise the availability of such services and the charges therefor using media of general distribution.

47 U.S.C. § 214(e)(1).

<sup>&</sup>lt;sup>4</sup> 47 U.S.C. § 254(e).

<sup>&</sup>lt;sup>5</sup> Section 214(e)(1) provides that:

<sup>&</sup>lt;sup>6</sup> 47 U.S.C. § 214(e)(2).

<sup>&</sup>lt;sup>7</sup> 47 U.S.C. § 214(e)(6). See Fort Mojave Telecommunications, Inc., Gila River Telecommunications, Inc., San Carlos Telecommunications, Inc., and Tohono O'Odham Utility Authority as Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, Memorandum Opinion and Order, CC Docket No. 96-45, 13 FCC Rcd 4547 (Com. Car. Bur. 1998); Petition of Saddleback Communications for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act, CC Docket No. 96-45, 13 FCC Rcd 22433 (Com. Car. Bur. 1998).

<sup>&</sup>lt;sup>8</sup> 47 U.S.C. § 214(e)(6).

<sup>&</sup>lt;sup>9</sup> See 47 U.S.C. § 214(e)(6).

designation as an ETC pursuant to section 214(e)(6).<sup>10</sup>

# B. The Western Wireless Petition and Twelfth Report and Order

- 4. On September 1, 1998, Western Wireless petitioned the Wyoming Public Service Commission (Wyoming Commission) for designation as an ETC pursuant to section 214(e)(2) for service to be provided in Wyoming. On August 13, 1999, the Wyoming Commission dismissed Western Wireless' request for designation on the grounds that the Wyoming Telecommunications Act denies the Wyoming Commission the authority to regulate "telecommunications services using . . . cellular technology," except for quality of service. 11 The Wyoming Commission interpreted this prohibition as preventing it from designating Western Wireless as an ETC because Western Wireless provides service using cellular technology. 12
- 5. On September 29, 1999, Western Wireless filed with this Commission a petition pursuant to section 214(e)(6) seeking designation of eligibility to receive federal universal service support for service to be provided in parts of Wyoming. <sup>13</sup> In its petition, Western Wireless contends that the Commission should assume jurisdiction and designate Western Wireless as an ETC pursuant to section 214(e)(6) given the Wyoming Commission's determination that it lacked jurisdiction under applicable state law to designate wireless carriers

Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, Public Notice, FCC 97-419 (rel. Dec. 29, 1997) (Section 214(e)(6) Public Notice). In this Public Notice, the Commission delegated authority to the Chief of the Common Carrier Bureau to designate carriers as ETCs pursuant to section 214(e)(6). The Commission instructed carriers seeking designation to, among other things, set forth the following information in a petition: (1) a certification and brief statement of supporting facts demonstrating that the petitioner is "not subject to the jurisdiction of a state commission;" (2) a certification that the petitioner offers all services designated for support by the Commission pursuant to section 254(c); (3) a certification that the petitioner offers the supported services "either using its own facilities or a combination of its own facilities and resale of another carrier's services;" (4) a description of how the petitioner "advertise[s] the availability of [supported] services and the charges therefor using media of general distribution." In addition, if the petitioner meets the definition of a "rural telephone company" pursuant to section 3(37) of the Act, the petitioner must identify its study area. If the petitioner is not a rural telephone company, the petitioner must include a detailed description of the geographic service area for which it requests a designation for eligibility from the Commission.

<sup>&</sup>lt;sup>11</sup> The Amended Application of WWC Holding Co., Inc., (Western Wireless) For Authority To Be Designated As An Eligible Telecommunications Carrier, Order Granting Motion to Dismiss Amended Application, Docket No. 70042-TA-98-1 (Record No. 4432) (Aug. 13, 1999) (Wyoming Order), citing Wyoming Telecommunications Act of 1995.

<sup>12</sup> Wyoming Order at 2-4.

<sup>&</sup>lt;sup>13</sup> See Western Wireless Petition. The petition contains a list of the specific rural telephone company study areas and non-rural incumbent local exchange carrier (LEC) exchanges for which Western Wireless is seeking designation. Western Wireless Petition, App. D. See also Letter from David L. Sieradzki, Counsel for Western Wireless Corp., to Magalie Roman Salas, FCC, dated Dec. 20, 2000 – Proposed Designated ETC Service Areas (Western Wireless Dec. 20 ex parte).

as ETCs.14

6. In the Twelfth Report and Order, the Commission concluded that only in those instances where a carrier provides the Commission with an "affirmative statement" from the state commission or a court of competent jurisdiction that the state lacks jurisdiction to perform the designation will the Commission consider section 214(e)(6) designation requests from carriers serving non-tribal lands. Consistent with this framework, the Commission concluded that it has authority under section 214(e)(6) to consider the merits of Western Wireless' petition for designation as an ETC in Wyoming.

### III. DISCUSSION

- 7. We find that Western Wireless has met all the requirements set forth in sections 214(e)(1) and (e)(6) to be designated as an ETC by this Commission for the designated service areas in the state of Wyoming. As discussed above, the Commission previously concluded in the Twelfth Report and Order that Western Wireless is a common carrier not subject to the jurisdiction of the Wyoming Commission. We conclude that Western Wireless has demonstrated that it will offer and advertise the services supported by the federal universal service support mechanism throughout the designated service areas upon designation as an ETC. In addition, we find that the designation of Western Wireless as an ETC in those areas served by rural telephone companies serves the public interest by promoting competition and the provision of new technologies to consumers in high-cost and rural areas of Wyoming. We therefore designate Western Wireless as an ETC for the requested service areas within Wyoming.
- 8. Offering the Service Designated for Support. We conclude that Western Wireless has demonstrated that it will offer the services supported by the federal universal service mechanism upon designation as an ETC. We therefore conclude that Western Wireless complies with the requirement of section 214(e)(1)(A) to "offer the services that are supported by Federal universal service support mechanisms under section 254(c)." 18
  - 9. As noted in its petition, Western Wireless is a commercial mobile radio service

<sup>&</sup>lt;sup>14</sup> See generally Western Wireless Petition.

<sup>&</sup>lt;sup>15</sup> The Commission defined an "affirmative statement" as "any duly authorized letter, comment, or state commission order indicating that [the state commission] lacks jurisdiction to perform the designation over a particular carrier." See Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, CC Docket No. 96-45, FCC 00-208 (rel. June 30, 2000) at para. 113 (Twelfth Report and Order).

<sup>&</sup>lt;sup>16</sup> Twelfth Report and Order at para. 113.

<sup>&</sup>lt;sup>17</sup> Twelfth Report and Order at para. 137.

<sup>&</sup>lt;sup>18</sup> 47 U.S.C. § 214(e)(1)(A).

(CMRS) provider with operations in 17 states, including the eastern portion of Wyoming. Western Wireless states that it currently offers each of the supported services enumerated in section 54.101(a) of the Commission's rules throughout its existing cellular service area. Once designated as an ETC, Western Wireless "intends (and commits) to make available a 'universal service' offering that includes all of the supported services, for consumers in the designated services areas in Wyoming." Western Wireless indicates that it will make available its universal service offering over its existing cellular network infrastructure and spectrum. Western Wireless also commits to provide service to any requesting customer within the designated service areas, and if necessary, will deploy any additional facilities to do so.<sup>22</sup>

10. No party disputes that Western Wireless has the capability to offer single-party service, voice-grade access to the public network, the functional equivalent to DTMF signaling, access to operator services, access to interexchange services, access to directory assistance, and toll limitation for qualifying low-income consumers.<sup>23</sup> Nor does any party dispute that Western Wireless complies with state law and Commission directives on providing access to emergency services.<sup>24</sup> In addition, although the Commission has not set a minimum local usage requirement, Western Wireless currently offers varying amounts of local usage in its monthly service plans.<sup>25</sup> In fact, Western Wireless intends to offer its universal service customers a rate plan that includes unlimited local usage.<sup>26</sup> In sum, we conclude that Western Wireless has demonstrated that it will offer each of the supported services upon designation as an ETC in the requested service areas in Wyoming.<sup>27</sup> Several state commissions have examined Western

Western Wireless Petition at 2. See also Letter from David L. Sieradzki, Counsel for Western Wireless, to Magalie Roman Salas, FCC, dated October 24, 2000 (Western Wireless Oct. 24 ex parte).

Western Wireless Petition at 3, 7-10. See also Western Wireless Petition, App. C – Affidavit of Gene DeJordy.

<sup>&</sup>lt;sup>21</sup> Western Wireless Petition at 7.

<sup>&</sup>lt;sup>22</sup> Western Wireless Petition at 3.

Pursuant to section 254(c), the Commission has defined those services that are to be supported by the federal universal service mechanism to include: (1) single-party service; (2) voice grade access to the public switched network; (3) local usage; (4) Dual Tone Multifrequency (DTMF) signaling or its functional equivalent; (5) access to emergency services, including 911 and enhanced 911; (6) access to operator service; (7) access to interexchange services; (8) access to directory assistance; and, (9) toll limitation for qualifying low-income customers. 47 C.F.R. § 54.101(a).

<sup>&</sup>lt;sup>24</sup> See 47 C.F.R. § 54.101(a)(5) ("Access to emergency services includes access to 911 and enhanced 911 to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems"). Western Wireless currently offers access to emergency services throughout its cellular service area by dialing 911. Western Wireless indicates that no public emergency service provider in Wyoming has made arrangements for the delivery of E911 to Western Wireless. Western Wireless indicates that it is capable and ready to provide E911 upon request. Western Wireless Petition at 9.

<sup>&</sup>lt;sup>25</sup> Western Wireless Petition at 8.

<sup>&</sup>lt;sup>26</sup> Western Wireless Petition at 8.

<sup>&</sup>lt;sup>27</sup> AT&T Comments at 3; CTIA Comments at 3; PCIA Comments at 3-4.

Wireless' proposed service offering and reached the same conclusion in designating Western Wireless as an ETC.<sup>28</sup>

- 11. We reject the suggestion that Western Wireless' proposed service offering lacks the requisite specificity to satisfy the eligibility requirements of section 214(e).<sup>29</sup> Western Wireless has provided supplemental information relating to the services offered, the charges for those services, and availability of customer assistance services.<sup>30</sup> We also reject the contention that Western Wireless has not sufficiently specified whether it intends to use its fixed or mobile service to fulfill its ETC obligations.<sup>31</sup> In so doing, we reject the implication that service offered by CMRS providers is ineligible for universal service support.<sup>32</sup> In the *Universal Service Order*, the Commission concluded that universal service support mechanisms and rules should be competitively neutral.<sup>33</sup> The Commission concluded that the principle of competitive neutrality includes technological neutrality.<sup>34</sup> Thus, a common carrier using any technology, including CMRS, may qualify for designation so long as it complies with the section 214(e) eligibility criteria. Western Wireless indicates that it has the ability to offer the supported services using its existing facilities.
- 12. We reject the contention of a few commenters that it is necessary to adopt eligibility criteria beyond those set forth in section 214(e) to prevent competitive carriers from attracting only the most profitable customers, providing substandard service, or subsidizing

<sup>&</sup>lt;sup>28</sup> See, e.g., Minnesota Public Utilities Commission, Minnesota Cellular Corporation's Petition for Designation as an Eligible Telecommunications Carrier, Order Granting Preliminary Approval and Requiring Further Filings, Docket No. P-5695/M-98-1285 (Oct. 27, 1999); Public Utilities Commission of Nevada, Application of WWC License LLC d/b/a CELLULAR ONE to be designated as an Eligible Telecommunications Carrier in the State of Nevada pursuant to NAC 704.680461 and Section 254 of the Telecommunications Act of 1996, Compliance Order, Docket No. 00-6003 (Aug. 17, 2000); Public Service Commission of Utah, Petition of WWC Holding Co., Inc., for Designation as an Eligible Telecommunications Carrier, Report and Order, Docket No. 98-2216-01 (July 21, 2000).

Wyoming Telecommunications Association Comments at 7; US West Comments at 2; Coalition of Rural Telephone Companies Reply Comments at 11.

Western Wireless indicates that the charge for its basic universal service offering, excluding taxes and regulatory assessments, will be \$14.99 per month. In addition, Western Wireless indicates its intention to make reasonable arrangements to resolve service disruptions. Customer service personnel will also be available 24 hours per day, 7 days per week. See Western Wireless Oct. 24 ex parte - Attachment 1 (Information Sheet).

<sup>&</sup>lt;sup>31</sup> Coalition of Rural Telephone Companies Comments at 11; Wyoming Telecommunications Association Comments at 11, 14.

<sup>&</sup>lt;sup>32</sup> Coalition of Rural Telephone Companies Comments at 5-7; Wyoming Telecommunications Association Comments at 11-14.

<sup>&</sup>lt;sup>33</sup> Universal Service Order, 12 FCC Rcd 8776, 8801, para. 46.

<sup>&</sup>lt;sup>34</sup> Universal Service Order, 12 FCC Rcd at 8802, para. 49 ("We anticipate that a policy of technological neutrality will foster the development of competition and benefit certain providers, including wireless, cable, and small businesses, that may have been excluded from participation in universal service mechanisms . . .").

unsupported services with universal service funds.<sup>35</sup> As the Commission noted in the *Universal Service Order*, section 214(e) prevents eligible carriers from attracting only the most desirable customers by limiting eligibility to "common carriers" and by requiring eligible carriers to offer and advertise the supported services "throughout the service area." We also note that section 254(e) requires that "[a] carrier that receives [universal service] support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." intended."

- 13. We find that these statutory provisions are sufficient to ensure that competitive carriers use universal service funds to make the supported services available to all requesting customers throughout the service area. We also believe that the forces of competition will provide an incentive to maintain affordable rates and quality service to customers. Competitive ETCs will receive universal service support only to the extent that they acquire customers. In order to do so, it is reasonable to assume that competitive ETCs must offer a service package comparable in price and quality to the incumbent carrier. In addition, we emphasize that a carrier's ETC designation may be revoked if the carrier fails to comply with the statutory ETC and common carrier obligations.
- 14. Offer the Supported Services Using a Carrier's Own Facilities. We conclude that Western Wireless has satisfied the requirement of section 214(e)(1)(A) that it offer the supported services using either its own facilities or a combination of its own facilities and resale of another carrier's services. Western Wireless states that it intends to provide the supported services using its "existing cellular network infrastructures, consisting of switching, trunking, cell sites, and network equipment, together with any expansions and enhancements to the network." We find this certification sufficient to satisfy the requirements of section 214(e)(1)(A).
- 15. Advertising the Supported Services. We conclude that Western Wireless has demonstrated that it satisfies the requirement of section 214(e)(1)(B) to advertise the availability of the supported services and the charges therefor using media of general distribution. Western Wireless certifies that it intends to advertise the availability of its universal service offering, and the charges therefor, using media of general distribution. Specifically, Western Wireless

<sup>&</sup>lt;sup>35</sup> US West Comments at 12-14; Wyoming Telecommunications Association Comments at 7.

The Act requires common carriers to furnish "communications services upon reasonable request," 47 U.S.C. § 201(a), and states that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services. . . ." 47 U.S.C. § 202(a).

<sup>&</sup>lt;sup>37</sup> See Universal Service Order, 12 FCC Rcd at 8855-56, paras. 142-43.

<sup>&</sup>lt;sup>38</sup> 47 U.S.C. § 254(e).

<sup>&</sup>lt;sup>39</sup> 47 U.S.C. § 214(e)(1)(A).

Western Wireless Petition at 10-11.

<sup>&</sup>lt;sup>41</sup> Western Wireless Petition at 11.

indicates that it will expand upon its existing advertising media, including television, radio, newspaper, and billboard advertising, as necessary, to ensure that consumers within its designated service area are fully informed of its universal service offering. <sup>42</sup> Moreover, given that ETCs receive universal service support only to the extent that they serve customers, we believe that strong economic incentives exist, in addition to the statutory obligation, to advertise the universal service offering in Wyoming.

- Mestern Wireless as an ETC in Wyoming in those designated service areas that are served by rural telephone companies. Western Wireless has made a threshold demonstration that its service offering fulfills several of the underlying federal policies favoring competition. We find that there is no empirical evidence on the record to support the contention that the designation of Western Wireless as an ETC in those designated service areas served by rural telephone companies in Wyoming will harm consumers. In fact, we conclude that those consumers will benefit from the provision of competitive service and new technologies in high-cost and rural areas.
- 17. We note that an important goal of the Act is to open local telecommunications markets to competition.<sup>45</sup> Designation of competitive ETCs promotes competition and benefits consumers in rural and high-cost areas by increasing customer choice, innovative services, and new technologies. We agree with Western Wireless that competition will result not only in the deployment of new facilities and technologies, but will also provide an incentive to the incumbent rural telephone companies to improve their existing network to remain competitive, resulting in improved service to Wyoming consumers.<sup>46</sup> In addition, we find that the provision of competitive service will facilitate universal service to the benefit of consumers in Wyoming by creating incentives to ensure that quality services are available at "just, reasonable, and affordable rates."<sup>47</sup>
- 18. Although we recognize the substantial benefits of competition to consumers, we conclude that additional factors may be taken into consideration in the public interest examination required by section 214(e)(6) prior to the designation of an additional ETC in an

<sup>42</sup> Western Wireless Petition at 11.

<sup>&</sup>lt;sup>43</sup> See 47 U.S.C. § 214(e)(6).

<sup>&</sup>lt;sup>44</sup> See Coalition of Rural Telephone Companies Comments at 9-11; Wyoming Telecommunications Association Comments at 7-8.

<sup>&</sup>lt;sup>45</sup> According to the Joint Explanatory Statement, the purpose of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designated to accelerate rapidly the private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . ." Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 458, 104<sup>th</sup> Cong., 2d Sess. at 113 (Joint Explanatory Statement).

<sup>46</sup> Western Wireless Petition at 11-13.

<sup>&</sup>lt;sup>47</sup> 47 U.S.C. § 254(b)(1).

area served by a rural telephone company, such as whether consumers will be harmed. In so doing, we recognize that Congress expressed a specific intent to preserve and advance universal service in rural areas as competition emerges.<sup>48</sup> In particular, we believe that Congress was concerned that consumers in areas served by rural telephone companies continue to be adequately served should the incumbent telephone company exercise its option to relinquish its ETC designation under section 214(e)(4).<sup>49</sup>

- 19. Western Wireless demonstrates a financial commitment and ability to provide service to rural consumers that minimizes the risk that it may be unable to satisfy its statutory ETC obligations after designation.<sup>50</sup> We note that Western Wireless currently provides service in 17 western states.<sup>51</sup> Western Wireless also indicates that it can provide the supported services using its own facilities.<sup>52</sup> By choosing to use its own facilities to provide service in Wyoming, Western Wireless can continue to offer service to any requesting customer even if the incumbent carrier subsequently withdraws from providing service.<sup>53</sup>
- 20. Nor are we convinced that the incumbent rural telephone carriers will relinquish their ETC designation or withdraw service altogether in the event that Western Wireless is designated as an ETC in Wyoming.<sup>54</sup> None of the incumbent rural telephone companies at issue in this proceeding has indicated any intention to do so.<sup>55</sup> In the absence of any empirical information to support this assertion, we decline to conclude that this constitutes a serious risk to consumers. In addition, Western Wireless, as an ETC, has a statutory duty to offer service to

<sup>&</sup>lt;sup>48</sup> 47 U.S.C. § 214(e)(6) (stating that before designating an additional ETC for an area served by a rural telephone company, the Commission shall find that the designation is in the public interest). See also 47 U.S.C. § 254(b)(3).

<sup>&</sup>lt;sup>49</sup> See Letter from Earl W. Comstock, Counsel for Nucentrix, to Magalie Roman Salas, FCC, dated October 25, 2000.

We note that Western Wireless has filed its 1999 Annual Report containing substantial financial information for the period between 1997-1999 in this proceeding. *See* Western Wireless Oct. 24 ex parte - Attachment 2 (Western Wireless 1999 Annual Report).

<sup>51</sup> Western Wireless Petition at 2.

<sup>&</sup>lt;sup>52</sup> Western Wireless Petition at 10.

We note, however, that an ETC is not required to provide service using its own facilities. Section 214(e)(1)(A) allows a carrier designated as an ETC to offer the supported services "either using its own facilities or a combination of its own facilities and resale of another carrier's services." See 47 U.S.C. § 214(e)(1)(A).

<sup>&</sup>lt;sup>54</sup> US West Comments at 17.

Even if the incumbent carrier determined that it no longer desired to be designated as an ETC, section 214(e)(4) requires the ETC seeking to relinquish its ETC designation to give advance notice to the Commission. Prior to permitting the ETC to cease providing universal service in an area served by more than one ETC, section 214(e)(4) requires that the Commission "ensure that all customers served by the relinquished carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier." The Commission may grant a period, not to exceed one year, within which such purchase or construction shall be completed. See 47 U.S.C. § 214(e)(4).

every customer within the designated service area. We reiterate that a carrier's ETC designation may be revoked if the carrier fails to comply with the statutory ETC and common carrier obligations.

- 21. Western Wireless also indicates that, in many instances, its local calling area is larger than the local calling area of the existing local exchange carrier. We believe that rural consumers may benefit from expanded local calling areas by making intrastate toll calls more affordable to those consumers. As discussed above, Western Wireless also indicates that it will offer varying amounts of local usage, including a package containing unlimited local usage to consumers. In addition, Western Wireless has stated its intent to offer a new fixed wireless service to consumers in Wyoming.
- 22. We reject the general argument that rural areas are not capable of sustaining competition for universal service support. We do not believe that it is self-evident that rural telephone companies cannot survive competition from wireless providers. Specifically, we find no merit to the contention that designation of an additional ETC in areas served by rural telephone companies will necessarily create incentives to reduce investment in infrastructure, raise rates, or reduce service quality to consumers in rural areas. To the contrary, we believe that competition may provide incentives to the incumbent to implement new operating efficiencies, lower prices, and offer better service to its customers. While we recognize that some rural areas may in fact be incapable of sustaining more than one ETC, no evidence to demonstrate this has been provided relating to the requested service areas. We believe such evidence would need to be before us before we could conclude that it is not in the public interest to designate Western Wireless as an ETC for those areas served by rural telephone companies.
- 23. <u>Designated Service Areas</u>. We designate Western Wireless as an ETC for the specific service areas in Wyoming discussed herein. <sup>62</sup> For those areas served by the non-rural

<sup>&</sup>lt;sup>56</sup> Western Wireless Oct. 24 ex parte – Attachment 1 (Information Sheet) at 1.

<sup>&</sup>lt;sup>57</sup> See Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Further Notice of Proposed Rulemaking, CC Docket No. 96-45, 14 FCC Rcd 21177, 21227 at paras. 122-123 (1999).

<sup>&</sup>lt;sup>58</sup> Western Wireless Petition at 8.

<sup>&</sup>lt;sup>59</sup> Western Wireless Petition at 8.

<sup>&</sup>lt;sup>60</sup> Wyoming Telecommunications Association Comments at 7-8.

<sup>&</sup>lt;sup>61</sup> As noted in the *Universal Service Order*, we believe that arguments like those of the Wyoming Telecommunications Association "present a false choice between competition and universal service." *Universal Service Order*, 12 FCC Rcd at 8803, para. 50.

The term "service area" means a geographic area established by a state commission (or the Commission under section 214(e)(6)) for the purpose of determining universal service obligations and support mechanisms. 47 U.S.C. § 214(e)(5). In the *Universal Service Order*, the Commission recommended that the states designate non-rural service areas that are smaller than the incumbent carrier's study area. *Universal Service Order*, 12 FCC Rcd at 8879, para. 185.

carrier Qwest (formerly US West), we designate the specific exchanges requested by Western Wireless to the extent that such exchanges are located within the state of Wyoming. We note that Western Wireless has requested designation in two of Qwest's exchanges, Laramie and Cheyenne, that extend beyond the boundaries of Wyoming. We limit the designation in these two exchanges to the area that they cover within the state of Wyoming. Section 214(e)(6) directs the Commission to designate a carrier as an ETC only in those instances when the relevant state commission lacks jurisdiction. Because the Wyoming Commission has indicated by order that it lacks jurisdiction to perform the designation in Wyoming, we conclude that the Commission's authority, in this instance, does not extend beyond the boundaries of Wyoming.

24. For the requested service areas served by rural telephone companies, <sup>66</sup> we designate as Western Wireless' service area the study areas that are located within the state of Wyoming. <sup>67</sup> The study area of Chugwater Telephone is located entirely within Wyoming, and we designate this study area as Western Wireless' service area without modification. Western Wireless also requests designation for the study areas in Wyoming of Golden West Telephone (Golden West), Range Telephone Coop. (Range), RT Communications, Inc., <sup>68</sup> and United Telephone Company of the West (United Telephone). <sup>69</sup> The study areas of these telephone companies include exchanges that extend beyond the boundaries of Wyoming. <sup>70</sup> As discussed

<sup>&</sup>lt;sup>63</sup> Western Wireless seeks designation for the following exchanges of Qwest in Wyoming: Buffalo, Cheyenne, Casper, Douglas, Glendo, Glenrock, Gillette, Laramie, Lusk, Rawlins, Riverton, Sheridan, Wheatland, and Wright. See Western Wireless Petition, App. D. See also Western Wireless Dec. 20 ex parte – Proposed Designated ETC Service Areas.

<sup>&</sup>lt;sup>64</sup> 47 U.S.C. § 214(e)(6).

<sup>65</sup> Wyoming Order at 2-4.

Western Wireless seeks designation for the following areas served by rural telephone companies in Wyoming: Chugwater Telephone Co. (Chugwater); Golden West Telephone Coop. Inc. (Edgemont); Range Telephone Coop. Inc. (Alzada, Arvada, Clearmont, Decker, Southeast, Sundance); RT Communications, Inc. (Albin, Burns, Carpenter, Gas Hills, Hulett, Kaycee, Midwest, Moorcroft, Newcastle, Osage, Pine Bluff, Upton, Jeffrey City, Thermopolis, Shoshoni, Worland) and United Telephone Company of the West (Lyman, Guernsey, Lingle, Lagrange, Torrington). Western Wireless Petition, App. D. See also Western Wireless Dec. 20 ex parte – Proposed Designated ETC Service Areas.

<sup>&</sup>lt;sup>67</sup> For areas served by a rural telephone company, section 214(e)(5) of the Act provides that the company's service area will be its study area unless and until the Commission and states establish a different definition of service area for such company. 47 U.S.C. § 214(e)(5). See also Universal Service Order, 12 FCC Rcd at 8880, para. 186.

<sup>&</sup>lt;sup>68</sup> RT Communications, Inc. is a wholly-owned subsidiary of Range.

<sup>&</sup>lt;sup>69</sup> See Western Wireless Dec. 20 ex parte.

<sup>&</sup>lt;sup>70</sup> Golden West's Edgemont exchange serves lines in both South Dakota and Wyoming. Range's Alzada and Decker exchanges serve lines in both Montana and Wyoming. United Telephone's Wyoming study area extends into Nebraska (LaGrange) and its Nebraska study area extends into Wyoming (Lyman). RT Communications' Wyoming study area extends beyond Wyoming into Montana and South Dakota. See Western Wireless Dec. 20 ex parte. See also Letter from David L. Sieradzki, Counsel for Western Wireless Corp., to Magalie Roman Salas, FCC dated Dec. 19, 2000 – Attached Maps.

above, we conclude that we have authority under section 214(e)(6) to designate such study areas only to the extent that they are contained within the boundaries of the state of Wyoming. <sup>71</sup> Accordingly, we designate as Western Wireless' service area the study areas of Golden West, Range, RT Communications, and United Telephone to the extent that such study areas are contained within Wyoming. We exclude from Western Wireless' service area those portions of the requested study areas that are outside the state of Wyoming. <sup>72</sup>

# IV. ANTI-DRUG ABUSE ACT CERTIFICATION

25. Pursuant to section 5301 of the Anti-Drug Abuse Act of 1988, no applicant is eligible for any new, modified, or renewed instrument of authorization from the Commission, including authorizations issued pursuant to section 214 of the Act, unless the applicant certifies that neither it, nor any party to its application, is subject to a denial of federal benefits, including Commission benefits.<sup>73</sup> This certification must also include the names of individuals specified by section 1.2002(b) of the Commission's rules.<sup>74</sup> Western Wireless has provided a certification consistent with the requirements of the Anti-Drug Abuse Act of 1988.<sup>75</sup> We find that Western Wireless has satisfied the requirements of the Anti-Drug Abuse Act of 1988, as codified in sections 1.2001-1.2003 of the Commission's rules.

### V. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED that, pursuant to the authority contained in section 214(e)(6) of the Communications Act, 47 U.S.C. § 214(e)(6), and the authority delegated in sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, Western Wireless Corporation IS DESIGNATED AN ELIGIBLE TELECOMMUNICATIONS CARRIER for designated service areas in Wyoming, as discussed herein.

We note that in the *Universal Service Order*, the Commission set forth procedures for modifying a rural telephone company's study area through joint action by the Commission and the relevant state. *See Universal Service Order*, 12 FCC Rcd at 8880-83, paras. 186-190. The instant case deals with study areas that cross state boundaries, however, unlike the situation addressed in the *Universal Service Order*. Accordingly, we find inapplicable the procedures for modification of a study area contained within a state's boundaries.

In so doing, we follow the approach of state commissions that have designated carriers in similar circumstances. See, e.g., Application of WWC Texas RSA Limited Partnership for Designation as an Eligible Telecommunications Carrier, PUC Docket Nos. 22289 and 22295, SOAH Docket Nos. 473-00-1167 and 473-00-1168, Order at 6-7 (Texas Pub. Util. Comm'n, rel. Oct., 2000).

<sup>&</sup>lt;sup>73</sup> 47 C.F.R. § 1.2002(a); 21 U.S.C. § 862.

<sup>&</sup>lt;sup>74</sup> Section 1.2002(b) provides that a certification pursuant to that section shall include: "(1) If the applicant is an individual, that individual; (2) If the applicant is a corporation or unincorporated association, all officers, directors, or persons holding 5% or more of the outstanding stock or shares (voting/and or non-voting) of the petitioner; and (3) If the applicant is a partnership, all non-limited partners and any limited partners holding a 5% or more interest in the partnership." 47 C.F.R. § 1.2002(b).

<sup>&</sup>lt;sup>75</sup> See Western Wireless Petition at 13, App.E.

27. IT IS FURTHER ORDERED that a copy of this Memorandum Opinion and Order SHALL BE transmitted by the Common Carrier Bureau to the Universal Service Administrative Company.

FEDERAL COMMUNICATIONS COMMISSION

Carol E. Mattey Deputy Chief, Common Carrier Bureau

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# Before the Federal Communications Commission Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	
	)	
Petitions for Reconsideration of	)	
Western Wireless Corporation's	)	
Designation as an Eligible	)	
Telecommunications Carrier	)	
In the State of Wyoming	)	

### ORDER ON RECONSIDERATION

Adopted: October 16, 2001 Released: October 19, 2001

By the Commission: Commissioner Martin approving in part, concurring in part and issuing a statement.

#### I. INTRODUCTION

1. In this Order, we deny petitions for reconsideration of the Common Carrier Bureau's (Bureau) designation of Western Wireless Corporation (Western Wireless) as an eligible telecommunications carrier (ETC) for the purpose of receiving federal universal service support in the state of Wyoming. Specifically, we affirm the Bureau's conclusion that the designation of Western Wireless is consistent with the statutory eligibility requirements of section 214(e) of the Communications Act of 1934, as amended (the Act), and Congress' mandate under section 254 to promote the availability of affordable telecommunications service to all consumers.<sup>2</sup>

### II. BACKGROUND

#### A. The Act

2. Section 254(e) of the Act provides that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support." Section 214(e)(1) requires that a common carrier designated as an ETC must

<sup>&</sup>lt;sup>1</sup> Golden West Telephone Cooperative, Project Telephone Company, and Range Telephone Cooperative, Petition for Reconsideration filed January 25, 2001 (Golden West et al. Petition); Chugwater Telephone Company, Range Telephone Cooperative, Inc. and RT Communications, Inc., Petition for Reconsideration and/or Clarification filed January 25, 2001 (Chugwater et al. Petition).

<sup>&</sup>lt;sup>2</sup> 47 U.S.C. §§ 214(e), 254.

<sup>&</sup>lt;sup>3</sup> 47 U.S.C. § 254(e).

offer and advertise the services supported by the federal universal service mechanisms throughout the designated service area.<sup>4</sup> In the case of an area served by a rural telephone company, section 214(e)(5) provides that "service area" means such company's "study area" unless and until the Commission and the states, after taking into account the recommendations of a Federal-State Joint Board, establish a different definition of service area for such company.<sup>5</sup>

3. Pursuant to section 214(e)(2), state commissions have the primary responsibility for designating carriers as ETCs. Section 214(e)(6), however, directs the Commission to designate as an ETC "a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State Commission." Before designating an additional ETC for an area served by a rural telephone company, the Commission must find that the designation is in the public interest.<sup>8</sup>

### B. Wyoming ETC Order and Petitions for Reconsideration

4. <u>Wyoming ETC Order</u>. On December 26, 2000, the Bureau designated Western Wireless, pursuant to section 214(e)(6), as an ETC in designated service areas within Wyoming, including areas served by both rural and non-rural telephone companies. In so doing, the Bureau concluded that Western Wireless satisfied the statutory eligibility requirements of section 214(e) to receive federal universal service support. Specifically, the Bureau concluded that Western Wireless demonstrated that it would offer and advertise the services supported by the federal universal service mechanism throughout the designated service areas. In addition, the Bureau concluded that designation of Western Wireless as an ETC in those areas served by rural

<sup>&</sup>lt;sup>4</sup> 47 U.S.C. § 214(e)(1). Section 214(e)(5) defines the term "service area" as a "geographic area established by a State commission (or the Commission under [section 214(e)(6)]) for the purpose of determining universal service obligations and support mechanisms." 47 U.S.C. § 214(e)(5).

<sup>&</sup>lt;sup>5</sup> 47 U.S.C. § 214(e)(5). Generally, a study area corresponds to an incumbent local exchange carrier's entire service territory within a state.

<sup>&</sup>lt;sup>6</sup> 47 U.S.C. § 214(e)(2).

<sup>&</sup>lt;sup>7</sup> 47 U.S.C. § 214(e)(6). See also Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, Public Notice, FCC 97-419 (rel. Dec. 29, 1997). In this Public Notice, the Commission delegated authority to the Common Carrier Bureau to designate carriers pursuant to section 214(e)(6).

<sup>&</sup>lt;sup>8</sup> 47 U.S.C. § 214(e)(6).

<sup>&</sup>lt;sup>9</sup> Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming, Memorandum Opinion and Order, CC Docket No. 96-45, DA 00-2896 (rel. Dec. 26, 2000) (Wyoming ETC Order). As part of its petition, Western Wireless provided an affirmative statement from the Wyoming Commission indicating that it did not have jurisdiction to perform the ETC designation.

Wyoming ETC Order at para. 7.

<sup>&</sup>lt;sup>11</sup> Wyoming ETC Order at paras. 8-15.

telephone companies serves the public interest by promoting competition and the provision of new technologies to consumers in high-cost and rural areas of Wyoming.<sup>12</sup> For those areas served by rural telephone companies, the Bureau designated as Western Wireless' service area the entire study areas of those rural telephone companies to the extent that they are located within the state of Wyoming.<sup>13</sup> In so doing, the Bureau noted that some of these rural telephone company study areas include exchanges that extend beyond the boundaries of Wyoming.

- Petitions for Reconsideration. In January 2001, two petitions for reconsideration were filed on behalf of several rural telephone companies operating in Wyoming. Golden West, Project Telephone, and Range Telephone contend in their petition that the Bureau improperly interpreted the statutory provisions of section 214(e)(5) in designating Western Wireless' service area. These petitioners contend that, in the case of an area served by a rural telephone company, section 214(e)(5) requires the designated service area for an additional ETC to be the same as the rural telephone companies' study area, unless and until the Commission and states establish a different definition of service area for such company. These petitioners take issue with the Bureau's conclusion that, where study areas cross state boundaries, the procedures for modification of service area boundaries are inapplicable. 14 These petitioners contend that the statute provides only one exception to this requirement, and that is where the prescribed federalstate process has been followed. Alternatively, these petitioners suggest that Western Wireless could obtain ETC status in each of the surrounding states in which a rural telephone company's study area extends beyond the boundaries of Wyoming. 15 Finally, these petitioners suggest that the designation of service areas that extend beyond the boundaries of a state under section 214(e)(6) is a novel issue that must be resolved by the Commission, rather than the Bureau.<sup>16</sup>
- 6. Chugwater Telephone, Range Telephone, and RT Communications raise several issues for reconsideration in their joint petition. First, these petitioners suggest that the Bureau reconsider and remand Western Wireless' petition to the Wyoming Commission for designation.<sup>17</sup> These petitioners contend that the state commission is better suited to make such designations and that Wyoming has recently enacted legislation that will provide the state commission with jurisdiction to designate wireless carriers as ETCs.<sup>18</sup> Second, these petitioners

<sup>&</sup>lt;sup>12</sup> Wyoming ETC Order at paras. 16-22.

<sup>&</sup>lt;sup>13</sup> The Bureau granted Western Wireless ETC designation in areas served by four rural telephone companies in Wyoming including Chugwater Telephone, Golden West Telephone, Range Telephone (including the areas served by its wholly-owned subsidiary RT Communications, Inc.), and United Telephone Company of the West. *See Wyoming ETC Order* at para. 24.

<sup>&</sup>lt;sup>14</sup> Golden West et al. Petition at 5. See also 47 C.F.R. § 54.207

<sup>&</sup>lt;sup>15</sup> Golden West et al. Petition at 10.

<sup>&</sup>lt;sup>16</sup> Golden West et al. Petition at 11-12.

<sup>&</sup>lt;sup>17</sup> Chugwater et al. Petition at 3.

<sup>&</sup>lt;sup>18</sup> Chugwater et al. Reply to Opposition at 2.

contend that the *Wyoming ETC Order* designates Western Wireless in exchanges that differ from those set forth in Western Wireless' original petition.<sup>19</sup> As a result, petitioners contend there was no opportunity to file comments regarding those exchanges not specifically set forth in the original petition. Finally, these petitioners argue that the rural telephone companies at issue will suffer potential harm in the form of loss of market share from the designation of Western Wireless as an ETC in their respective study areas.<sup>20</sup> Petitioners assert that this may result in the loss of service to consumers or reduced investment in rural areas by the rural telephone companies that would not be in the public interest.

#### III. DISCUSSION

- 7. We deny the requests for reconsideration of the Bureau's designation of Western Wireless as an ETC in the state of Wyoming. Specifically, we conclude that the Bureau's designation was consistent with the statutory guidelines of section 214(e) and Congress' mandate to promote competition and the availability of affordable telecommunications service to all consumers.<sup>21</sup>
- 8. Designated Service Area. We deny the petitioners' request to reconsider the Bureau's designation of Western Wireless' service area as the rural telephone companies' study areas to the extent that they are located within the state of Wyoming.<sup>22</sup> Under section 214(e)(6), the Commission is effectively authorized to stand in the place of the state commission for purposes of designating carriers over which the state does not have jurisdiction. We believe the Commission's authority to perform the designation is no greater than that of the state that would have otherwise made the designation. Therefore, where a rural telephone company's study area boundaries extend beyond the boundaries of the state, we also believe the Commission has no authority to designate any portion of the study area that extends beyond the state's boundaries. As a result, the Commission does not have the discretion in these circumstances to designate the entire study area as the ETC's service area. The designation performed in the Wyoming ETC Order thus encompasses the maximum geographic area for which the Commission has jurisdiction under section 214(e)(6) to do so. In these circumstances, we find no basis for delaying the ETC designation or pursuing additional procedures to consult with neighboring state commissions.
- 9. Further, the federal-state process cited by petitioners, as set forth in section 214(e) and the Commission's rules, also contemplates situations in which only one entity, either the

<sup>&</sup>lt;sup>19</sup> Chugwater et al. Petition at 4.

<sup>&</sup>lt;sup>20</sup> Chugwater et al. Petition at 11-23.

<sup>47</sup> U.S.C. § 254. According to the Joint Explanatory Statement, the purpose of the 1996 Actals "to provide a pro-compensive, de negaliatory national policy-framework designed to accelerate rapidly, the private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." Joint Explanatory Statement of the Committee of Conference, HaR, Conf. Rep., No. 458, 104 cong., 2d. Sess, at 1.13.

We note that the study area of Chugwater is contained entirely within the boundaries of Wyoming.

state commission or this Commission, has the authority to designate the rural telephone companies' entire study area as the ETC's service area.<sup>23</sup> The statute simply does not address circumstances in which an existing study area for a rural carrier may extend beyond state borders, and in which two or more states might have been involved in establishing the service area. In any event, we do not believe that Congress envisioned that any state commission might need to involve another state, or seek its permission, before designating an ETC for an existing service area otherwise lying wholly within the designating state's borders, or that another state potentially could interfere with a state's authority to designate an additional ETC within its own borders.<sup>24</sup> Certainly nothing in the language or policies underlying section 214(e) contemplates such a result.

- 10. Petitioners' request also appears inconsistent with the statutory policies underlying section 254(e). Under the joint process envisioned by the petitioners, where study area boundaries cross state lines, each adjoining state with little or no incentive to act quickly upon such a request could delay the designation of an ETC in another state indefinitely. In addition, if as suggested by the petitioners, Western Wireless were required to obtain ETC designation in each of the bordering states prior to being designated in Wyoming, this could indefinitely delay the designation process and create an almost insurmountable administrative barrier to competitive entry in Wyoming. For example, we note that designation of Western Wireless' requested service areas would require approval from as many as four different state regulatory bodies to allow this Commission to perform its designation under section 214(e)(6).<sup>25</sup>
- 11. Moreover, to the extent that petitioners are concerned that the state commissions be given an opportunity to express any concerns regarding the designated service areas, we note that interested parties have been given ample opportunity to comment upon the designated service areas in this case. A public notice seeking comment on Western Wireless' petition, including the service areas to be designated in areas served by the rural telephone companies, was issued on November 12, 1999, over one year prior to Western Wireless' designation in the Wyoming ETC Order. None of the state commissions potentially affected by this proceeding filed comments or otherwise objected to the service areas designated by the Bureau, either during

<sup>&</sup>lt;sup>23</sup> 47 C.F.R. § 54.207. In addition, we note that the Commission adopted the process outlined in this rule prior to the enactment of section 214(e)(6). This rule, therefore, does not contemplate the situation in which the Commission, rather than the state commission, has the responsibility under section 214(e)(6) to perform the designation.

<sup>&</sup>lt;sup>24</sup> The Texas Public Utilities Commission has reached a similar conclusion. *See Application of WWC Texas RSA Limited Partnership for Designation as an Eligible Telecommunications Carrier*, PUC Docket Nos. 22289 and 22295, SOAH Docket Nos. 473-00-1167, Order at 6-7 (Oct. 2000).

<sup>&</sup>lt;sup>25</sup> We note, however, that the vast majority of this area lies within the state of Wyoming.

Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier to Provide Services Eligible for Universal Service Support in Wyoming, Public Notice, CC Docket No. 96-45, DA 99-2511 (rel. Nov. 12, 1999) (Western Wireless Public Notice) at 1. In addition, notice of the Commission's intent to act upon Western Wireless' petition was published in the Federal Register. 65 Fed. Reg. 47883, 47899 (Aug. 4, 2000).

this proceeding or on reconsideration following the designation of Western Wireless' service area in the *Wyoming ETC Order*. We believe, therefore, that the state commissions have been provided with a reasonable opportunity to comment and participate in Western Wireless' petition and the designation of service areas in the *Wyoming ETC Order*.

It is addition as the Commission concluded in *Universal Service Order*, the primary objective in retaining the tural telephone company's study area as the designated service area of a competitive ETC is to ensure that competitors will not be able to target only the customers that are the least expensive to serve and thus undercut the incumbent carrier's ability to provide service to high-cost customers. Rural telephone companies; however, now have the option of disaggregating and targeting high-cost support below the study area level so that support will be distributed in a manner that ensures that the per-line level of support is more closely associated with the cost of providing service. Therefore, any concern regarding feream-skimming, of customers that may arise in designating a service area that does not encompass the entire study area of the rural telephone company has been substantially climinated.

- 13. Finally, we reject petitioners' argument that the designation of service areas that cross state boundaries is a novel issue of first impression that should have been addressed by the Commission, rather than the Bureau.<sup>29</sup> The Commission has delegated to the Bureau the authority to designate carriers as ETCs pursuant to section 214(e)(6), including the designation of service areas.<sup>30</sup> We therefore conclude that resolution of this issue was within the scope of the Bureau's delegated authority. Nevertheless, the Commission now affirms the conclusions reached by the Bureau in the *Wyoming ETC Order*.
- 14. <u>Due Process</u>. We deny the petitioners' request to reconsider the Bureau's decision due to an alleged lack of prior notice regarding the service areas at issue. Interested parties were provided with sufficient notice as to the incumbent carriers whose study areas were subject to designation. In its petition for designation as an ETC, Western Wireless requested designation for service areas "consisting of the *study areas* of certain local exchange carriers that are [rural telephone companies]" as well as certain wire centers served by US West (now Qwest). Moreover, Western Wireless' petition provided sufficient notice that some of the

<sup>&</sup>lt;sup>27</sup> Federal-State Joint Board on Universal Service Order, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776 at 8881, para. 189 (1997) (Universal Service Order) (subsequent history omitted).

<sup>&</sup>lt;sup>28</sup> Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, FCC 01-157 at paras. 144-164 (rel. May 23, 2001) (Rural Task Force Order).

<sup>&</sup>lt;sup>29</sup> Golden West et al. Petition at 11-12.

Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, Public Notice, FCC 97-419 (rel. Dec. 29, 1997).

Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming filed October 25, 1999 (Western Wireless Petition) at 12 [emphasis added].

exchanges for which it requested designation extend beyond Wyoming state boundaries. In its petition, Western Wireless provided a list of exchanges in Wyoming, including exchanges served by Chugwater, Golden West, Range Telephone, and United Telephone, for which it sought designation.<sup>32</sup> Although this list of exchanges did not include every individual exchange that constitute the entire study area of these rural telephone companies, we find that the issue is not whether notice of the specific exchanges was provided, but whether the rural telephone companies were given notice as to the request for designation in their study areas, as required by section 214(e)(5).

- 15. As discussed above and consistent with section 214(e)(5), Western Wireless requested designation in the study areas served by rural telephone companies in Wyoming, including Chugwater, Golden West, Range, and United Telephone. We believe that the rural telephone companies were aware, or reasonably should have been aware, of the exchanges that constitute their own study areas within Wyoming. Indeed, the petitioners were also best positioned to be aware from the outset of this proceeding that a portion of their respective study areas included exchanges that were partially located in states outside of Wyoming. We conclude that interested parties were provided with sufficient prior notice to comment on the service areas in which the Bureau ultimately designated Western Wireless an ETC in Wyoming. Moreover, shortly before the release of the *Wyoming ETC Order*, Western Wireless filed a complete list of the exchanges that constitute the rural telephone company study areas in Wyoming for which it sought designation.<sup>33</sup> We believe, however, that even in the absence of this filing, carriers were made aware in Western Wireless' petition of the study areas in which Western Wireless was seeking designation, and had an opportunity to provide comment in this proceeding.<sup>34</sup>
- 16. <u>State Jurisdiction</u>. We deny the petitioners' request to reconsider and remand the designation of Western Wireless to the Wyoming Commission. Pursuant to Commission guidelines, the Bureau acted on Western Wireless' petition only after receiving an affirmative statement from the Wyoming Commission that it lacked jurisdiction over Western Wireless.<sup>35</sup> The Bureau's designation of Western Wireless as an ETC in Wyoming occurred before Wyoming enacted legislation to allow the Wyoming Commission to perform such designations.

<sup>&</sup>lt;sup>32</sup> Western Wireless Petition at App. D. This list includes some exchanges that overlap Wyoming boundaries.

Letter from David L. Sieradzki, Counsel for Western Wireless, to Magalie Roman Salas, FCC, filed December 20, 2000 (Western Wireless Dec. 20 ex parte).

We also note that although RT Communications was not specifically identified in Western Wireless' original petition, RT Communications is a wholly-owned subsidiary of Range Telephone. In fact, Range's study area includes those areas served by RT Communications. As a result, section 214(e)(5) requires designation of those areas served by RT Communications in Wyoming as part of Range's study area. In addition, Western Wireless identified the RT Communications exchanges in its December 20, 2000 ex parte.

Twelfth Report and Order, 15 FCC Rcd at 12263-64, paras 112-113. The Wyoming Commission issued an order indicating that it did not have jurisdiction to perform the designation of Western Wireless. See The Amended Application of WWC Holding Co., Inc. (Western Wireless) For Authority To Be Designated As An Eligible Telecommunications Carrier, Order Granting Motion to Dismiss Amended Application, Docket No. 70042-TA-98-1 (Record No. 4432) (Aug. 13, 1999).

Contrary to the contention of the petitioners, the Bureau's designation of Western Wireless has no bearing on any future wireless carrier designation proceedings in Wyoming.<sup>36</sup> As the Commission stated in the *Twelfth Report and Order*, each carrier serving non-tribal lands is required to receive an affirmative statement from the state commission that it lacks jurisdiction over the carrier, regardless of whether similarly situated carriers have received such affirmative statements.<sup>37</sup> Thus, the Bureau's decision to perform the designation of Western Wireless in this case in no way precludes the Wyoming Commission from performing designations involving wireless carriers in the future.

- 17. <u>Public Interest</u>. We deny the petitioners' request to reconsider the Bureau's finding that Western Wireless' designation as an ETC is in the public interest in those areas served by rural telephone companies. We note that none of the rural telephone companies affected by the findings in the *Wyoming ETC Order* presented data in that proceeding.<sup>38</sup> On reconsideration, petitioners attempt to introduce new facts and evidence into consideration in an effort to support the contention that rural study areas cannot support competition. We do not find such evidence to be persuasive.
- 18. At the outset, we note that section 1.106(c) of the Commission's rules provides that new facts may be presented in a petition for reconsideration only if the facts relate to events that occurred or circumstances that changed since the last opportunity to present such matters; the facts were not known to the petitioner, and could not reasonably have been learned prior to such opportunity; or the public interest requires consideration of the facts.<sup>39</sup> The facts now presented on reconsideration for the first time, including the number of customers served, size of the service areas, and investment in rural areas served by the petitioners, are facts that were known or, through the exercise of diligence, could have been known and presented prior to the adoption of the *Wyoming ETC Order*. As a result, we conclude that the proper time for presenting such evidence for consideration was prior to the adoption of the *Wyoming ETC Order*.<sup>40</sup>
- 19. Nevertheless, we find that the petitioners provide no basis to reconsider the Bureau's conclusion that it is in the public interest to designate Western Wireless as an ETC in Wyoming in those designated service areas that are served by rural telephone companies. <sup>41</sup> As the Bureau noted in its prior order, the designation of a qualified ETC promotes competition and benefits consumers in rural and high-cost areas by increasing customer choice, innovative

<sup>&</sup>lt;sup>36</sup> Chugwater et al. Petition at 3.

<sup>&</sup>lt;sup>37</sup> Twelfth Report and Order, 15 FCC Rcd at 12264, para. 113.

<sup>&</sup>lt;sup>38</sup> The Bureau requested public comment on Western Wireless' petition on November 12, 1999. *See Western Wireless Public Notice*.

<sup>&</sup>lt;sup>39</sup> 47 C.F.R. § 1.106(c).

<sup>&</sup>lt;sup>40</sup> Western Wireless Opposition to Reconsideration at 14.

Wyoming ETC Order at para. 16.

services, and new technologies.<sup>42</sup> We find unpersuasive the evidence now provided by the petitioners, such as the number of customers and size of the geographic areas that the rural telephone companies serve, to support the contention that designation of competitive ETCs in rural areas will necessarily result in increased rates or reduced investment in rural areas.<sup>43</sup> The evidence submitted regarding the number of customers and geographic areas served by the rural telephone companies is typical of most rural areas.<sup>44</sup> Although petitioners allege that competition may erode their customer base forcing higher rates to remaining customers, such a result is highly speculative. We have no reason to believe that a significant number of consumers will terminate their wireline service as a result of Western Wireless' designation as an ETC. In fact, the petitioners themselves note the technological advantages of wireline service over cellular service in providing advanced services to consumers.<sup>45</sup> In addition, the federal universal service mechanisms support all lines served by eligible carriers in high-cost and rural areas. Thus, to the extent that the competitive ETC provides new lines to customers that are currently unserved or second lines to customers that have service, there will be no reduction in support to the incumbent carrier.

20. We conclude that the public interest would not be served by reconsidering the Bureau's earlier finding and beginning the designation process anew. Western Wireless filed its original request for designation with the Wyoming Commission nearly three years ago. <sup>46</sup> As discussed above, we believe that there are no benefits to be gained by adding any further delay to this proceeding. We should allow Western Wireless to provide a competitive service to consumers in Wyoming on a competitively neutral basis. We therefore deny the petitioners' request for reconsideration of this issue.

### IV. ORDERING CLAUSES

21. IT IS ORDERED that, pursuant to the authority contained in sections 1, 4(i), 214(e), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. § 151, 154(i), 214(e), and 254, section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the petition for reconsideration filed by Chugwater Telephone, Co., Range Telephone Co., and RT

<sup>42</sup> Wyoming ETC Order at para. 17.

<sup>&</sup>lt;sup>43</sup> For example, Chugwater indicates that it serves approximately 290 customers over a 900 square mile area. Although Chugwater concludes that this results in an average of 0.3 customers per square mile, no evidence is provided to support the apparent contention that its customers are uniformly located throughout the study area, rather than in clusters such as small towns. Chugwater et al. Petition at 10-11. Similar evidence is provided for those areas served by RT Communications and Range Telephone. *Id.* at 13, 18.

<sup>&</sup>lt;sup>44</sup> Petitioners also contend that the inability of cellular carriers to provide advanced services should be taken into consideration in the public interest analysis. Chugwater et al. Petition at 12,17. We do not find this persuasive. We note that the eligibility criteria of section 214(e) require only the offering of those services that are supported by the federal universal service mechanism. Such services are enumerated in the Commission's rules. See 47 C.F.R. § 54.101(a). As discussed supra, Western Wireless has satisfied this requirement.

<sup>&</sup>lt;sup>45</sup> Chugwater et al. Petition at 17-18.

<sup>46</sup> Wyoming ETC Order at para. 4.

Communications, Inc. filed on January 25, 2001 IS DENIED.

22. IT IS FURTHER ORDERED that the petition for reconsideration filed by Golden West Telephone Coop., Project Telephone Co., and Range Telephone Co. on January 25, 2001 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas Secretary

# STATEMENT OF COMMISSIONER KEVIN J . MARTIN, APPROVING IN PART AND CONCURRING IN PART

Re: Federal-State Joint Board on Universal Service; Petitions for Reconsideration of Western Wireless Corporation's Designation as an Eligible Telecommunications Carrier in the State of Wyoming, Order on Reconsideration, CC Docket No. 96-45

As I have expressed elsewhere, I have concerns with the Commission's policy of using universal support as a means of creating "competition" in high cost areas. I am hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. This policy may make it difficult for any one carrier to achieve the economies of scale necessary to serve all of the customers in a rural area, leading to inefficient and/or stranded investment and a ballooning universal service fund.

I nevertheless agree with the result of this Order, because its statements on universal service policy are unnecessary to its result. As the Order makes clear, none of the affected parties presented data on the effects of designating an additional ETC until reconsideration proceedings. Our rules do not allow such facts to be presented for the first time on reconsideration, absent special circumstances not present here. Accordingly, on that basis, I approve the Order except for the part designated "Public Interest" (¶¶ 17-20), with respect to which I concur only in the result.



## Before the Federal Communications Commission Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	
	)	
Western Wireless Corporation	)	
Petition for Designation as an	)	,
Eligible Telecommunications Carrier for the	)	
Pine Ridge Reservation in South Dakota	j i	

### MEMORANDUM OPINION AND ORDER

Adopted: September 27, 2001 Released: October 5, 2001

By the Commission: Commissioner Martin dissenting and issuing a statement.

#### I. INTRODUCTION

1. In this Order, we grant the petition of Western Wireless Corporation (Western Wireless) to be designated as an eligible telecommunications carrier (ETC) for service offered to tribal members on the Pine Ridge Reservation in South Dakota pursuant to section 214(e)(6) of the Communications Act of 1934, as amended (the Act). In so doing, we conclude that Western Wireless has satisfied the statutory eligibility requirements of section 214(e)(1). Specifically, we conclude that Western Wireless has demonstrated that it will offer and advertise the services supported by the federal universal service support mechanisms throughout the designated service area. In addition, we find that the designation of Western Wireless as an ETC in those areas of the reservation served by rural telephone companies serves the public interest by promoting competition and the provision of new technologies to tribal members on the Pine Ridge Reservation that suffer from significant impediments to affordable telecommunications service.

#### II. BACKGROUND

### A. The Act

2. Section 254(e) of the Act provides that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal

<sup>&</sup>lt;sup>1</sup> Western Wireless Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota, filed January 19, 2001 (Western Wireless Petition). See 47 U.S.C. § 214(e)(6). As we discuss below, a companion order released today explains our conclusion that the Commission has jurisdiction under section 214(e)(6) to make this ETC designation.

<sup>&</sup>lt;sup>2</sup> 47 U.S.C. § 214(e)(1).

service support." Section 214(e)(1) requires that a common carrier designated as an ETC must offer and advertise the service supported by the federal universal service mechanisms throughout the designated service area.<sup>4</sup>

3. Pursuant to section 214(e)(2), the state commissions have the primary responsibility for designating carriers as ETCs.<sup>5</sup> Section 214(e)(6), however, directs the Commission, upon request, to designate as an ETC "a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State Commission." Under section 214(e)(6), upon request and consistent with the public interest, convenience, and necessity, the Commission may, with respect to an area served by a rural telephone company, and shall, in all other cases, designate more than one common carrier as an ETC for a designated service area, so long as the requesting carrier meets the requirements of section 214(e)(1). Before designating an additional ETC for an area served by a rural telephone company, the Commission must find that the designation is in the public interest. On December 29, 1997, the Commission released a Public Notice establishing the procedures that carriers must use when seeking Commission designation as an ETC pursuant to section 214(e)(6).

# B. Twelfth Report and Order and the Western Wireless Petition

4. In the *Twelfth Report and Order*, the Commission concluded that a carrier seeking a designation of eligibility to receive federal universal service support for telecommunications service offered on tribal lands may petition the Commission for designation under section

A common carrier designated as an eligible telecommunications carrier under [subsections 214(e)(2), (3), or (6)] shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received—

- (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's service (including the services offered by another eligible telecommunications carrier); and
- (B) advertise the availability of such services and the charges therefor using media of general distribution.

<sup>&</sup>lt;sup>3</sup> 47 U.S.C. § 254(e).

<sup>&</sup>lt;sup>4</sup> 47 U.S.C. § 214(e)(1) provides that:

<sup>&</sup>lt;sup>5</sup> 47 U.S.C. § 214(e)(2).

<sup>&</sup>lt;sup>6</sup> 47 U.S.C. § 214(e)(6). See Fort Mojave Telecommunications, Inc., Gila River Telecommunications, Inc., San Carlos Telecommunications, Inc., and Tohono O'Odham Utility Authority as Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, Memorandum Opinion and Order, CC Docket No. 96-45, 13 FCC Rcd 4547 (Com. Car. Bur. 1998); Petition of Saddleback Communications for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act, CC Docket No. 96-45, 13 FCC Rcd 22433 (Com Car. Bur. 1998).

<sup>&</sup>lt;sup>7</sup> 47 U.S.C. § 214(e)(6).

<sup>&</sup>lt;sup>8</sup> 47 U.S.C. § 214(e)(6).

<sup>&</sup>lt;sup>9</sup> Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, Public Notice, FCC 97-419 (rel. Dec. 29, 1997). In this Public Notice, the Commission delegated authority to the Chief of the Common Carrier Bureau to designate carriers as ETCs pursuant to section 214(e)(6).

214(e)(6), without first seeking designation from the state commission.<sup>10</sup> The Commission indicated that it would proceed to the merits of such a petition if the Commission determines that the carrier is not subject to the jurisdiction of a state commission.<sup>11</sup>

5. On January 19, 2001, Western Wireless filed with the Commission a petition pursuant to section 214(e)(6) seeking designation of eligibility to receive federal universal service support for service to be offered on the Pine Ridge Reservation in South Dakota. In its petition, Western Wireless contends that the Commission should assume jurisdiction and designate Western Wireless as an ETC pursuant to section 214(e)(6) because the South Dakota Public Utilities Commission (South Dakota Commission) lacks jurisdiction over Western Wireless' provision of service on the reservation. In addition, Western Wireless contends that it satisfies the statutory and regulatory prerequisites for designation as an ETC under section 214(e). On October 5, 2001, the Commission released the *Pine Ridge Jurisdictional Order* concluding that the South Dakota Commission did not have jurisdiction to designate Western Wireless as an ETC for the provision of service to tribal members on the Pine Ridge Reservation, and therefore that the Commission is required to make that limited ETC designation.

### III. DISCUSSION

- 6. We find that Western Wireless has met the requirements set forth in sections 214(e)(1) and (e)(6) to be designated as an ETC by this Commission for a designated service area that includes tribal members residing on the Pine Ridge Reservation in South Dakota. Specifically, we conclude that Western Wireless has demonstrated that it will offer and advertise the services supported by the federal universal service support mechanism throughout the designated service area upon designation as an ETC. In addition, we find that designation of Western Wireless as an ETC in those areas served by rural telephone companies serves the public interest by promoting competition and the provision of affordable telecommunications service to consumers that suffer from significant impediments to telecommunications subscribership.
- 7. <u>Offering the Services Designated for Support</u>. We conclude that Western Wireless has demonstrated that it will offer the services supported by the federal universal service mechanism upon designation as an ETC. We therefore conclude that Western Wireless complies with the requirement of section 214(e)(1)(A) to "offer the services that are supported

<sup>&</sup>lt;sup>10</sup> Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved Areas, Including Tribal and Insular Areas, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, CC Docket No. 96-45, 15 FCC Rcd 12208 at 12265, para. 115 (2000) (Twelfth Report and Order).

<sup>&</sup>lt;sup>11</sup> Twelfth Report and Order, 15 FCC Rcd at 12267, para. 121.

<sup>12</sup> See generally Western Wireless Petition.

<sup>&</sup>lt;sup>13</sup> Western Wireless Petition at 1-7.

<sup>&</sup>lt;sup>14</sup> Western Wireless Petition at 19-29.

Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota; Federal-State Joint Board on Universal Service, Memorandum Opinion and Order, CC Docket No. 96-45, FCC 01-284 (rel. Oct. 5, 2001) (Pine Ridge Jurisdictional Order).

by the Federal universal service support mechanisms under section 254(c)."16

- 8. As noted in its petition, Western Wireless is currently providing cellular service in South Dakota, including service on the Pine Ridge Reservation. Western Wireless indicates that it currently offers tribal members on the Pine Ridge Reservation each of the supported services enumerated in the Commission's rules. No party disputes that Western Wireless has the capability to offer single-party service, voice-grade access to the public network, the functional equivalent to DTMF signaling, access to operator services, access to interexchange services, access to directory assistance, and toll limitation for qualifying low-income consumers. Nor does any party dispute that Western Wireless complies with state law and Commission directives on providing access to emergency services. In addition, although the Commission has not set a minimum local usage requirement, Western Wireless currently offers several service options that include varying amounts of local usage in its monthly service plans. In fact, Western Wireless indicates that tribal members on the Pine Ridge Reservation receive unlimited local usage within the defined local calling area. In sum, we conclude that Western Wireless has demonstrated that it will offer each of the supported services upon designation as an ETC on the Pine Ridge Reservation.
- 9. Offering the Supported Services Using a Carrier's Own Facilities. We conclude that Western Wireless has satisfied the requirement of section 214(e)(1)(A) that it offer the supported services using either its own facilities or a combination of its own facilities and resale of another carrier's services. Western Wireless states that it intends to provide the supported services using "its existing cellular network infrastructure, consisting of switching, trunking, cell sites, and network equipment that it owns or leases, together with any expansion and enhancements to that network." We find this certification sufficient to satisfy the requirements of section 214(e)(1)(A).
- 10. <u>Advertise the Supported Services</u>. We conclude that Western Wireless has demonstrated that it satisfies the requirement of section 214(e)(1)(B) to advertise the availability of the supported services and the charges therefor using media of general distribution. Western Wireless certifies that it will advertise the availability of its universal service offering, and the charges therefor, using media of general distribution.<sup>23</sup> Specifically, Western Wireless indicates that it currently employs several advertising media to promote its service, including television,

<sup>&</sup>lt;sup>16</sup> 47 U.S.C. § 214(e)(1)(A). Pursuant to section 254(c), the Commission has defined those services that are to be supported by the federal universal service mechanisms to include: (1) single-party service; (2) voice grade access to the public switched network; (3) local usage; (4) Dual Tone Multifrequency (DTMF) signaling or its functional equivalent; (5) access to emergency services, including 911 and enhanced 911; (6) access to operator service; (7) access to interexchange services; (8) access to directory assistance; and, (9) toll limitation for qualifying low-income customers. 47 C.F.R. § 54.101(a).

<sup>&</sup>lt;sup>17</sup> Western Wireless Petition at 19-20.

<sup>&</sup>lt;sup>18</sup> Western Wireless Petition at 20-24.

<sup>&</sup>lt;sup>19</sup> Western Wireless Petition at 20.

<sup>&</sup>lt;sup>20</sup> Western Wireless Petition at 20.

<sup>&</sup>lt;sup>21</sup> 47 U.S.C. § 214(e)(1)(A).

<sup>&</sup>lt;sup>22</sup> Western Wireless Petition at 24.

<sup>&</sup>lt;sup>23</sup> Western Wireless Petition at 24.

radio, newspaper, and billboard advertising. In addition, Western Wireless states that it will expand upon these media as necessary to ensure that tribal members on the Pine Ridge Reservation are fully informed of the new universal service offering. Consistent with the Commission's direction in the *Twelfth Report and Order*, we encourage Western Wireless to promote awareness of its universal service offerings, including low-income programs, through non-traditional means that may take into consideration the cultural and linguistic characteristics of the tribal members of the Pine Ridge Reservation. Moreover, given that ETCs receive universal service support only to the extent that they serve customers, we believe that strong economic incentives exist, in addition to the statutory obligation, to advertise the universal service offering on the Pine Ridge Reservation.

- Western Wireless as an ETC in those areas of the Pine Ridge Reservation that are served by rural telephone companies. Western Wireless has made a threshold demonstration that its service offering fulfills several of the underlying federal policies favoring competition and the provision of affordable telecommunications service to consumers. We note that tribal members residing on the Pine Ridge Reservation may face impediments to affordable telecommunications service that may be addressed by the introduction of wireless service. In addition, we note that Western Wireless has actively sought the participation of the tribe in formulating its service package and has entered into an agreement with the Oglala Sioux Tribe to specifically address the telecommunications needs of the Pine Ridge Reservation.<sup>27</sup>
- 12. An important goal of the Act is to open local telecommunications markets to competition. Designation of qualified ETCs promotes competition and benefits consumers by increasing customer choice, innovative services, and new technologies. Competition will allow tribal members on the Pine Ridge Reservation to choose service based on pricing, service quality, customer service, and service availability. In addition, we find that the provision of competitive service will facilitate universal service to the benefit of tribal members on the Pine Ridge Reservation by creating incentives to ensure that quality services are available at "just, reasonable, and affordable rates."
  - 13. Granting Western Wireless ETC status also will serve the public interest by

<sup>&</sup>lt;sup>24</sup> Western Wireless Petition at 24.

<sup>&</sup>lt;sup>25</sup> Twelfth Report and Order, 15 FCC Rcd at 12250, para. 79.

<sup>&</sup>lt;sup>26</sup> Three rural telephone companies serve portions of the Pine Ridge Reservation. These include: Fort Randall Telephone Co. d/b/a Mount Rushmore Tel. Co. (Fort Randall), Great Plains Communications, Inc. (Great Plains), and Golden West Telecommunications, Inc. (Golden West).

Western Wireless Petition at 2-7. See also Letter from John Yellow Bird Steele, President of the Oglala Sioux Tribe, to Michael Powell, Chairman of the FCC, dated March 12, 2001.

According to the Joint Explanatory Statement, the purpose of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly the private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . . ." Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 458, 104<sup>th</sup> Cong., 2d Sess. at 113 (Joint Explanatory Statement).

<sup>&</sup>lt;sup>29</sup> Western Wireless Petition at 27-28.

<sup>&</sup>lt;sup>30</sup> 47 U.S.C. § 254(b)(1).

removing impediments to increasing subscribership on the Reservation. In the *Twelfth Report* and *Order*, the Commission noted that along with depressed economic conditions and low per capita incomes, the following factors have been identified as impediments to subscribership on tribal lands: (1) the cost of basic service; (2) the cost of intrastate toll service (due to limited local calling areas); (3) inadequate telecommunications infrastructure and the cost of line extensions and facilities deployment in rural areas; and (4) lack of competitive service providers offering alternative technologies.<sup>31</sup> The record indicates that such impediments to subscribership exist on the Pine Ridge Reservation. For example, although parties vary in their estimate of telephone penetration rates on the Pine Ridge Reservation, it is clear that subscribership on the reservation is substantially lower than the national average of approximately 94 percent.<sup>32</sup> As the Commission noted in the *Twelfth Report and Order*, the lower-than-average subscribership levels on tribal lands are largely due to the lack of access to and/or affordability of telecommunications services in these areas.<sup>33</sup>

- 14. We believe the designation of Western Wireless as an ETC will increase subscribership by providing to tribal members on the Pine Ridge Reservation substantial benefits that are not available from the incumbent carriers.<sup>34</sup> For example, Western Wireless will provide an expanded local calling area to enable tribal members on the reservation who may currently pay toll charges to reach local government offices, health care providers, and family outside of the incumbent carrier's local calling area.<sup>35</sup> This will substantially enhance the affordability of service to many tribal members living on the reservation.<sup>36</sup> In addition, wireless service may provide a viable technological alternative for those tribal members residing in the most remote areas of the reservation that cannot afford the cost of expensive line extensions. We find support for this conclusion in Western Wireless' assertion that of over 1,000 customers that have signed up for its service on the Pine Ridge Reservation, approximately 42 percent had no prior telephone service.<sup>37</sup>
- 15. We reject the general argument that rural areas, such as the Pine Ridge Reservation, are not capable of sustaining competition for universal service support. In this case, parties have presented no evidence that designation of an additional ETC in areas served by rural telephone companies will reduce investment in infrastructure, raise rates, or reduce service quality to consumers in rural areas.<sup>38</sup> To the contrary, we believe that competition may provide

Twelfth Report and Order, 15 FCC Rcd at 12220, para. 20.

<sup>&</sup>lt;sup>32</sup> See, e.g., Western Wireless Petition at 26 (indicating that the penetration rate on the reservation is less than 50%); Golden West Comments at 15-18 (indicating that approximately 73% of households on the reservation are subscribers).

<sup>&</sup>lt;sup>33</sup> Twelfth Report and Order, 15 FCC Rcd at 12220, para. 20.

<sup>&</sup>lt;sup>34</sup> See Letter from John W. Steele, Tribal Chairman of the Oglala Sioux Tribe, to Magalie Roman Salas, FCC, filed June 13, 2001 (Oglala Sioux June 13 ex parte) (including 188 letters from members of the Oglala Sioux Tribe expressing satisfaction with Western Wireless' service offering and affordability).

Western Wireless Petition at 28. But see Golden West Comments at 21-22 (contending that Golden West has an extremely large local calling area); Fort Randall at 6-7.

<sup>&</sup>lt;sup>36</sup> Western Wireless Petition at 28.

Western Wireless Reply Comments at 4.

<sup>&</sup>lt;sup>38</sup> See, e.g., Fort Randall Comments at 6-7; Golden West Comments at 13-15; Great Plains Comments at 8.

incentives to the incumbent to implement new operating efficiencies, lower prices, and offer better service to customers. Although we recognize that some rural areas may in fact be incapable of sustaining more than one ETC, no evidence has been presented to demonstrate that this is the case on the Pine Ridge Reservation. In addition, we note that only a small portion of the total number of lines served by the three rural telephone companies at issue are located within the boundaries of the reservation.<sup>39</sup> Moreover, the federal universal service support mechanisms support all lines served by ETCs in high-cost areas. Therefore, to the extent that Western Wireless provides new lines to currently unserved consumers or second lines to existing wireline subscribers, it will have no impact on the amount of universal service support available to the incumbent rural telephone company for those lines that it continues to serve.<sup>40</sup>

- 16. In establishing a public interest requirement for those areas served by rural telephone companies, we believe Congress was concerned that consumers in rural areas continue to be adequately served should the incumbent carrier exercise its option to relinquish its ETC designation under section 214(e)(4). We are not presently persuaded by the record before us that the incumbent rural telephone companies will be forced to relinquish their ETC designation or withdraw service altogether to tribal members as a result of Western Wireless' designation as an ETC on the Pine Ridge Reservation.
- 17. <u>Designated Service Area.</u> We designate Western Wireless as an ETC for a service area that consists of tribal members residing on the Pine Ridge Reservation.<sup>42</sup> This designation is consistent with our conclusion in the *Pine Ridge Jurisdictional Order* that we have jurisdiction under section 214(e)(6) only over Western Wireless' service to tribal members residing on the Pine Ridge Reservation.<sup>43</sup> The designated service area differs from the study areas of three rural telephone companies (Fort Randall, Golden West, and Great Plains) in as much as these study areas extend both beyond the boundaries of the Reservation and to nontribal members residing on the Reservation. This modification is necessary, however, because under section 214(e)(6) the Commission's authority to designate carriers as ETCs is limited to areas in which the state does not have jurisdiction. As a result, the Commission's authority to designate Western Wireless as an ETC in this instance is limited to those tribal members residing

<sup>&</sup>lt;sup>39</sup> Fort Randall Comments at 2 (indicating that 45 out of 6,317 lines in its study area are located on the Reservation); Golden West Comments at 3 (indicating that approximately one-quarter of the 16,066 lines in its study area are located on the Reservation); Great Plains Comments at 2 (indicating that 121 out of 33,895 lines in its study area are located on the Reservation). *See also* Federal Universal Service Fund Size Projection and Contribution Base for the Third Quarter 2001, filed by the Universal Service Administrative Company on May 2, 2001 – Appendix HC1.

<sup>&</sup>lt;sup>40</sup> As noted above, Western Wireless indicates that nearly half of its customers on the Pine Ridge Reservation are new subscribers to the network.

We note that even if the incumbent carrier determined that it no longer desired to be designated as an ETC, section 214(e)(4) requires the ETC seeking to relinquish its ETC designation to give advance notice to the Commission. Prior to permitting the ETC to cease providing universal service in an area served by more than one ETC, section 214(e)(4) requires that the Commission "ensure that all customers served by the relinquished carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier." The Commission may grant a period, not to exceed one year, within which such purchase or construction shall be completed. 47 U.S.C. § 214(e)(4).

Western Wireless is therefore eligible to receive federal universal service support only for its provision of service to tribal members.

<sup>&</sup>lt;sup>43</sup> See generally Pine Ridge Jurisdictional Order.

within the boundaries of the Pine Ridge Reservation.

- We reject the contention of a few parties that the Commission must consult with the South Dakota Commission before designating Western Wireless as an ETC for a service area that differs from the rural telephone company's study area. 44 We conclude that the federal-state process in section 214(e)(5) contemplates situations in which only one entity, either the state commission or this Commission, has the authority to designate the rural telephone company's entire study area as the ETC's service area. 45 The statute does not address circumstances in which an existing study area for a rural carrier may extend beyond jurisdictional boundaries, and in which more than one designating entity might be involved in establishing the service area. In any event, we do not believe that Congress envisioned that the designating entity might need to involve another regulatory body, or seek its permission, before designating an ETC for a service area otherwise lying wholly within its jurisdiction, or that a regulatory body without jurisdiction over a carrier could interfere with the designating entity's authority to designate that carrier an additional ETC within its own jurisdictional authority. In addition, we note that the Commission rule and process cited by the South Dakota Commission and other commenters, as set forth in section 54,207 of the Commission's rules, was established prior to the adoption of section 214(e)(6). 46 This rule therefore did not contemplate the current situation in which the Commission, in the absence of state jurisdiction over a carrier, has a statutory obligation to be the sole designating entity under section 214(e)(6).<sup>47</sup>
- 19. To the extent that commenters are concerned that state commissions have an opportunity to express any concerns regarding the designated service area, we note that the South Dakota Commission has been given ample opportunity to participate in this proceeding. Under the procedures established in the *Twelfth Report and Order*, the Commission has ensured that the South Dakota Commission received notice of Western Wireless' petition for designation as an ETC and has been provided with an opportunity to participate in this proceeding. <sup>48</sup> Pursuant to the guidelines established in the *Twelfth Report and Order*, the Bureau released, and published in the Federal Register, a public notice establishing the pleading cycle for Western Wireless'

<sup>&</sup>lt;sup>44</sup> See, e.g., Golden West Comments at 12; South Dakota Commission Comments at 20-24. We note that the South Dakota Commission makes no substantive allegations that the designation of a service area that differs from the rural telephone company's study area will harm consumers in this case.

<sup>&</sup>lt;sup>45</sup> See Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming, Memorandum Opinion and Order, CC Docket No. 96-45, DA 00-2896 (rel. Dec. 26, 2000) at para. 24.

<sup>&</sup>lt;sup>46</sup> See 47 C.F.R. § 54.207(d). When Congress first enacted section 214(e) in 1996, the statute contained no provision for designation of carriers that were not subject to the jurisdiction of a state commission. As a result, such carriers had no access to a forum in which they could obtain ETC designation. In 1997, Congress amended the Act with the addition of section 214(e)(6) to correct this "oversight." 143 Cong. Rec. S12568 (daily ed. Nov. 13, 1997) (statement of Sen. McCain).

<sup>&</sup>lt;sup>47</sup> Section 54.207(d) of the Commission's rules contemplates situations in which the Commission may order a carrier to provide service under section 214(e)(3). Pursuant to section 214(e)(3), the Commission, with respect to interstate services, and the state, with respect to intrastate services, may order a common carrier to provide the supported services to an unserved community. See 47 U.S.C. § 214(e)(3).

<sup>48</sup> Twelfth Report and Order, 15 FCC Rcd at 12267, para. 120.

designation request.<sup>49</sup> In addition, the public notice was overnight-mailed directly to the South Dakota Commission to ensure that the state commission was notified of the notice and comment period. This process is specifically designed to notify and encourage participation by the states. In fact, the South Dakota Commission has filed comments in this proceeding that we have taken into consideration.<sup>50</sup>

- 20. In addition, as the Commission concluded in *Universal Service Order*, the primary objective in retaining the rural telephone company's study area as the designated service area of a competitive ETC is to ensure that competitors will not be able to target only the customers that are the least expensive to serve and thus undercut the incumbent carrier's ability to provide service.<sup>51</sup> We therefore also note that rural telephone companies now have the option of disaggregating and targeting high-cost support below the study area level so that support will be distributed in a manner that ensures that the per-line level of support is more closely associated with the cost of providing service.<sup>52</sup> Therefore, any concern regarding "creamskimming" of customers that may arise in designating a service area that does not encompass the entire study area of the rural telephone company has been substantially eliminated.
- 21. Finally, we reject the contention of some commenters that Western Wireless is precluded by the *Twelfth Report and Order* from seeking designation from this Commission due to its pending designation request before the South Dakota Commission for service areas outside the Pine Ridge Reservation.<sup>53</sup> In so doing, we note that Western Wireless has removed the study areas of Golden West and Great Plains, which encompass the vast majority of the Pine Ridge Reservation, from its request for designation before the South Dakota Commission.<sup>54</sup> It appears, however, that a small portion of Fort Randall's study area is subject to both the designation proceedings before this Commission and the South Dakota Commission.<sup>55</sup> To the extent that this

<sup>&</sup>lt;sup>49</sup> Common Carrier Bureau Seeks Comment on Western Wireless' Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota, Public Notice, CC Docket No. 96-45, DA 01-278 (rel. Feb. 2, 2001). See also 66 Fed. Reg. 9705 (Feb. 9, 2001).

<sup>&</sup>lt;sup>50</sup> See South Dakota Commission Comments.

<sup>&</sup>lt;sup>51</sup> Federal-State Joint Board on Universal Service Order, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776 at 8881, para. 189 (1997) (Universal Service Order) (subsequent history omitted).

<sup>&</sup>lt;sup>52</sup> Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, FCC 01-157 at paras. 144-164 (rel. May 23, 2001) (Rural Task Force Order).

<sup>&</sup>lt;sup>53</sup> See, e.g., Golden West Comments at 5-8; Great Plains Comments at 4; NTCA Comments at 2. See also Twelfth Report and Order, 15 FCC Rcd at 12268-69, para. 126 ("we will not make a jurisdictional determination under section 214(e)(6) if the affected state commission has initiated a proceeding in response to a designation request under section 214(e)(2).").

<sup>&</sup>lt;sup>54</sup> Letter from David Sieradzki, Counsel for Western Wireless, to Magalie Roman Salas, FCC, filed June 5, 2001. See also Letter from David Sieradzki, Counsel for Western Wireless, to Magalie Roman Salas, FCC, filed June 1, 2001. Letter from David Sieradzki, Counsel for Western Wireless, to Magalie Roman Salas, FCC, filed July 24, 2001 at 5.

Letter from Bruce Hanson, Fort Randall Telephone Company, to Magalie Roman Salas, FCC, filed July 10, 2001 (Fort Randall July 10 ex parte).

overlap exists, we conclude that such overlap is *de minimis*. Accordingly, we find that there is little potential for duplication of efforts by this Commission and the South Dakota Commission. For these reasons, we find that any *de minimis* overlap due to Fort Randall's study area would not preclude us from considering Western Wireless' petition.

### IV. ANTI-DRUG ABUSE ACT CERTIFICATION

22. Pursuant to section 5301 of the Anti-Drug Abuse Act of 1988, no applicant is eligible for any new, modified, or renewed instrument of authorization from the Commission, including authorizations issued pursuant to section 214, unless the applicant certifies that neither it, nor any party to its application, is subject to the denial of federal benefits, including Commission benefits. Western Wireless has provided a certification indicating that no party to its petition is subject to a denial of federal benefits, including Commission benefits, pursuant to section 5301 of the Anti-Drug Abuse Act of 1988.<sup>58</sup>

## V. ORDERING CLAUSES

- 23. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 4, and 214(e)(6) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, and 214(e)(6), Western Wireless Corporation IS DESIGNATED AN ELIGIBLE TELECOMMUNICATIONS CARRIER for service to the tribal members on the Pine Ridge Reservation in South Dakota, as discussed herein.
- 24. IT IS FURTHER ORDERED that a copy of this Memorandum Opinion and Order SHALL BE transmitted by the Common Carrier Bureau to the Universal Service Administrative Company.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas Secretary

<sup>&</sup>lt;sup>56</sup> For example, Fort Randall indicates that it provides service to only 47 customers on the Pine Ridge Reservation. See Fort Randall July 10 ex parte.

<sup>&</sup>lt;sup>57</sup> 47 C.F.R. § 1.2002(a); 21 U.S.C. § 862.

<sup>&</sup>lt;sup>58</sup> Western Wireless Petition at 30, App. H.

# DISSENTING STATEMENT OF COMMISSIONER KEVIN J. MARTIN

Re: Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota, Memorandum Opinion and Order, CC Docket No. 96-45.

I dissent from the Commission's determination that the South Dakota Public Utilities Commission lacks jurisdiction to designate Western Wireless as an eligible telecommunications carrier (ETC) in its service to Indians on the Pine Ridge Reservation. Section 214(e)(6) states that the Commission may designate as an ETC "a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission." 47 U.S.C. § 214(e)(6). As the Commission acknowledges, Congress added this provision based on concerns that some Indian controlled carriers had been unable to obtain a forum in which to seek ETC status due to limitations on the jurisdiction of particular State commissions. See Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, ¶ 98 (2000). Congress thus amended the statute to ensure that every carrier has some forum in which to obtain ETC status and thereby receive universal service support. See Pine Ridge Jurisdiction Order ¶ 3.

In my view, the Commission has taken a misguided approach to effectuating Congress's intent. Rather than simply ensuring that carriers have a place to go when State commissions or courts conclude that a State lacks jurisdiction, the Commission has made itself the arbiter of competing jurisdictional claims made by States and Indian tribes. The Commission has chosen to displace State claims of jurisdiction based on its own analysis of the merits, using "a complicated and intensely fact-specific legal inquiry informed by principles of tribal sovereignty and requiring the interpretation of treaties, and federal Indian law and state law." Twelfth Report and Order, 15 FCC Rcd ¶ 108. The Commission should refrain from making such determinations. As a body devoted to the oversight of our nation's communications, we have neither the experience, skill, nor authority to make these complicated and contentious decisions regarding the power of Indian tribes and States.

Moreover, despite the Commission's best efforts, its decision in this case is fraught with legal and practical problems. Among other things, we have set up a regime in which Western Wireless will receive universal service funding for serving Indians but not non-Indians, even if they live on the same land. This approach conflicts with our statutory obligation to make ETC designations for a particular "service area," which, by statute, "means a geographic area." 47 U.S.C. § 214(e)(5). In this case, the Orders even acknowledge that the State has jurisdiction to make the designation with respect to some of the residents within the service area. To the extent the Commission could not lawfully make a designation for the entire geographic area, as its Orders conclude, it bolsters my view that we should not be making designations in such cases at all. Additionally, we have set up a regime in which different carriers serving the same people will be regulated by different entities, depending largely on whether the carrier has "consented to tribal jurisdiction." Pine Ridge Jurisdiction Order ¶ 21. This regime will only encourage forum shopping and make impossible any coherent telecommunications policy on the reservation. Finally, in designating Western Wireless as an ETC, we have made a public interest

determination that may differ from the one made by the South Dakota Commission, which is in a superior position to assess the relevant local conditions.

I worry that this decision will only encourage more parties to come before the Commission seeking to displace State claims of jurisdiction. While Indian tribes may have legitimate claims of sovereignty in these situations, both they and the States deserve a better forum than this one to resolve their claims. I am convinced that the parties would be far better served by resolving such claims through the legal process in the courts and letting the Commission devote its limited resources to issues of communications. Accordingly, I respectfully dissent.

## Before the Federal Communications Commission Washington, D.C. 20554

In the Matter of	)
Federal-State Joint Board on Universal Service	) ) CC Docket No. 96-45 )
Western Wireless Corporation	)
Petition for Preemption of an	,
Order of the South Dakota	<i>)</i>
Public Utilities Commission	,

## **DECLARATORY RULING**

Adopted: July 11, 2000 Released: August 10, 2000

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement.

## I. INTRODUCTION

1. In this Declaratory Ruling, we provide guidance to remove uncertainty and terminate controversy regarding whether section 214(e)(1) of the Communications Act of 1934, as amended, (the Act) requires a common carrier to provide supported services throughout a service area prior to being designated an eligible telecommunications carrier (ETC) that may receive federal universal service support. We believe the guidance provided in this Declaratory Ruling is necessary to remove substantial uncertainty regarding the interpretation of section 214(e)(1) in pending state commission and judicial proceedings. We believe the guidance provided in this Declaratory Ruling will assist state commissions in acting expeditiously to fulfill their obligations under section 214(e) to designate competitive carriers as eligible for federal universal service support.

<sup>&</sup>lt;sup>1</sup> The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion, issue a declaratory ruling terminating a controversy or removing uncertainty. See 5 U.S.C. § 554(e), 47 C.F.R. § 1.2.

<sup>&</sup>lt;sup>2</sup> See, e.g., Letter from Competitive Universal Service Coalition, to Chairman William E. Kennard, FCC, dated March 8, 2000 at 2, 6; Letter from Gene DeJordy, Western Wireless, to Chairman William E. Kennard, FCC, dated March 29, 2000 at 1-2; Petition for Preemption of an Order of the South Dakota Public Utilities Commission, filed by Western Wireless (June 23, 1999) (Western Wireless petition); The Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier, Notice of Appeal to the Supreme Court of South Dakota, Civ. 99-235, filed by the South Dakota Public Utilities Commission (May 10, 2000) (South Dakota PUC Notice of Appeal).

- 2. We believe that interpreting section 214(e)(1) to require the provision of service throughout the service area prior to ETC designation prohibits or has the effect of prohibiting the ability of competitive carriers to provide telecommunications service, in violation of section 253(a) of the Act. We find that such an interpretation of section 214(e)(1) is not competitively neutral, consistent with section 254, and necessary to preserve and advance universal service, and thus does not fall within the authority reserved to the states in section 253(b). In addition, we find that such a requirement conflicts with section 214(e) and stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress as set forth in section 254. Consequently, under both the authority of section 253(d) and traditional federal preemption authority, we find that to require the provision of service throughout the service area prior to designation effectively precludes designation of new entrants as ETCs in violation of the intent of Congress. We believe that the guidance provided in this Declaratory Ruling will further the goals of the Act by ensuring that new entrants have a fair opportunity to provide service to consumers living in high-cost areas.
- 3. We note that Western Wireless has raised similar issues in its petition for preemption of a decision of the South Dakota Public Utilities Commission (South Dakota PUC).<sup>3</sup> In its petition, Western Wireless asks the Commission to preempt, under section 253 and as inconsistent with the Act, the South Dakota PUC's requirement that, pursuant to section 214(e), a carrier may not receive designation as an ETC unless it is providing service throughout the service area. In light of the recent South Dakota Circuit Court decision overturning the South Dakota PUC's decision and granting Western Wireless ETC status in each exchange served by non-rural telephone companies in South Dakota, we believe that it is unnecessary to act on the Western Wireless petition at this time.<sup>4</sup> In doing so, we note that section 253(d) requires the Commission to preempt state action only "to the extent *necessary* to correct such violation or inconsistency." We acknowledge, however, that the *South Dakota Circuit Court Order* has been automatically stayed with the filing of the South Dakota PUC's notice of appeal to the Supreme Court of South Dakota.<sup>6</sup> We therefore place Western Wireless' petition for preemption of the South Dakota PUC Order in abeyance pending final resolution of this appeal.<sup>7</sup> The Commission

<sup>&</sup>lt;sup>3</sup> See Western Wireless petition. Comments cited herein are in response to this petition. See also The Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier, Finding of Facts and Conclusions of Law; Notice of Entry of Order, Before the Public Utilities Commission of the State of South Dakota, TC98-146 (May 19, 1999).

<sup>&</sup>lt;sup>4</sup> Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier, Findings of Fact, Conclusions of Law, and Order, Civ. 99-235 (SD Sixth Jud. Cir. March 22, 2000) (South Dakota Circuit Court Order) (concluding that the South Dakota PUC "erred as a matter of law by determining that an applicant for ETC designation must first be providing a universal service offering to every location in the requested designated service area prior to being designated an ETC").

<sup>&</sup>lt;sup>5</sup> 47 U.S.C. § 253(d) (emphasis added).

<sup>&</sup>lt;sup>6</sup> See South Dakota Codified Laws § 15-26A-38.

South Dakota PUC Notice of Appeal.

will make a determination at that time as to whether it is necessary to proceed consistent with the guidance provided in this Declaratory Ruling.

#### II. BACKGROUND

#### A. The Act

4. Section 254(e) provides that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support." Section 214(e)(2) provides that "[a] State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of [subsection 214(e)(1)] as an eligible telecommunications carrier for a service area designated by the State commission."

## 5. Section 214(e)(1) provides that:

A common carrier designated as an eligible telecommunications carrier under [subsections 214(e)(2), (3), or (6)] shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received –

- (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and
- (B) advertise the availability of such services and the charges therefor using media of general distribution.<sup>10</sup>
- 6. Section 253 establishes the legal framework for Commission preemption of a state statute, regulation, or legal requirement that prohibits or has the effect of prohibiting the competitive provision of telecommunications service. The Commission has interpreted and applied this standard on a number of occasions.<sup>11</sup> First, the Commission must determine whether

<sup>&</sup>lt;sup>8</sup> 47 U.S.C. § 254(e).

<sup>&</sup>lt;sup>9</sup> 47 U.S.C. § 214(e)(2).

<sup>&</sup>lt;sup>10</sup> 47 U.S.C. § 214(e)(1).

Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act, as amended, Memorandum Opinion and Order, CC Docket No. 97-100, FCC 99-386 (rel. Dec. 23, 1999); Petition of Pittencrieff Communications, Inc., for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995, Memorandum Opinion and Order, File No. WTB/POL 96-2, 13 FCC Rcd 1735 (1997) aff'd CTIA v. FCC, 168 F.3d 1332 (D.C. Cir. 1999) (Pittencrieff Communications, Inc.); Silver Star Telephone Company, Inc., Petition for Preemption and (continued....)

the challenged law, regulation, or requirement violates section 253(a). Specifically, the Commission examines whether the state provision "prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." <sup>12</sup>

7. If the Commission finds that the state requirement violates section 253(a), then it will determine whether it is nevertheless permissible under section 253(b). The criteria set forth in section 253(b) preserve the states' ability to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service. The Commission has held that a state program must meet all three criteria – it must be "competitively neutral," "consistent with Section 254," and "necessary to preserve and advance universal service" – to fall within the "safe harbor" of section 253(b). The Commission has preempted state regulations for failure to satisfy even one of the three criteria. If a requirement otherwise impermissible under section 253(a) does not satisfy section 253(b), the Commission must preempt the enforcement of the requirement in accordance with section 253(d).

# B. Federal Preemption Authority

8. The Supremacy Clause of the Constitution empowers Congress to preempt state or local laws or regulations under certain specified conditions. As explained by the United States Supreme Court:

Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation

<sup>&</sup>lt;sup>12</sup> 47 U.S.C. § 253(a).

<sup>&</sup>lt;sup>13</sup> 47 U.S.C. § 253(b).

<sup>&</sup>lt;sup>14</sup> Pittencrieff Communications, Inc., 13 FCC Rcd at 1752, para. 33.

<sup>&</sup>lt;sup>15</sup> For example, in *Silver Star*, the Commission preempted a Wyoming statute for its failure to satisfy the "competitive neutrality" criterion. *Silver Star*, 12 FCC Rcd at 15658-60, paras. 42, 45.

<sup>&</sup>lt;sup>16</sup> 47 U.S.C. § 253(d). ("If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.").

<sup>&</sup>lt;sup>17</sup> Louisiana Public Service Commission v. FCC, 476 U.S. 355, 368 (1986).

and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.<sup>18</sup>

It is well established that "[p]re-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulations." 19

#### III. DISCUSSION

# A. Section 253(a) Analysis

## 1. Background

9. In order to determine whether a section 253(a) violation has occurred, we must consider whether the cited statute, regulation, or legal requirement "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." We therefore examine whether the requirement that a carrier must be providing service throughout the service area prior to designation as an ETC "may prohibit or have the effect of prohibiting" carriers that are not incumbent LECs from providing telecommunications service.

#### 2. Discussion

- 10. We find that requiring a new entrant to provide service throughout a service area prior to designation as an ETC has the effect of prohibiting the ability of the new entrant to provide intrastate or interstate telecommunications service, in violation of section 253(a).
- 11. <u>Legal Requirement</u>. As an initial matter, we find that the requirement that a new entrant must provide service throughout its service area as a prerequisite to designation as an ETC under section 214(e) constitutes a state "legal requirement" under section 253(a). We have previously concluded that Congress intended the phrase, "[s]tate or local statute or regulation, or other State or local requirement" in section 253(a), to be interpreted broadly.<sup>21</sup> The resolution of

<sup>&</sup>lt;sup>18</sup> *Id.* at 368-369 (citations omitted).

<sup>&</sup>lt;sup>19</sup> Id. at 369; Fidelity Federal Sav. And Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153-54 (1982); City of New York v. FCC, 486 U.S. 57, 64 (1988) ("[t]he statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof").

<sup>&</sup>lt;sup>20</sup> See 47 U.S.C. § 253(a).

<sup>&</sup>lt;sup>21</sup> See The Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way, Memorandum Opinion and Order, CC Docket No. 98-1, FCC 99-402 (rel. Dec. 23, 1999) (concluding that an agreement between a developer and the State creates a "legal requirement" subject to section 253 preemption) at paras. 17-18 (continued....)

a carrier's request for designation as an ETC by a state commission is legally binding on the carrier and may prohibit the carrier from receiving federal universal service support. We find therefore that any such requirement constitutes a "legal requirement" under section 253(a).

- 12. Prohibiting the Provision of Telecommunications Service. We find that an interpretation of section 214(e) requiring carriers to provide the supported services throughout the service area prior to designation as an ETC has the effect of prohibiting the ability of prospective entrants from providing telecommunications service. A new entrant faces a substantial barrier to entry if the incumbent local exchange carrier (LEC) is receiving universal service support that is not available to the new entrant for serving customers in high-cost areas. We believe that requiring a prospective new entrant to provide service throughout a service area before receiving ETC status has the effect of prohibiting competitive entry in those areas where universal service support is essential to the provision of affordable telecommunications service and is available to the incumbent LEC. Such a requirement would deprive consumers in high-cost areas of the benefits of competition by insulating the incumbent LEC from competition.
- 13. No competitor would ever reasonably be expected to enter a high-cost market and compete against an incumbent carrier that is receiving support without first knowing whether it is also eligible to receive such support.<sup>23</sup> We believe that it is unreasonable to expect an unsupported carrier to enter a high-cost market and provide a service that its competitor already provides at a substantially supported price. Moreover, a new entrant cannot reasonably be expected to be able to make the substantial financial investment required to provide the supported services in high-cost areas without some assurance that it will be eligible for federal universal service support.<sup>24</sup> In fact, the carrier may be unable to secure financing or finalize business plans due to uncertainty surrounding its designation as an ETC.
- 14. In addition, we find such an interpretation of section 214(e)(1) to be contrary to the meaning of that provision. Section 214(e)(1) provides that a common carrier designated as an eligible telecommunications carrier shall "offer" and advertise its services.<sup>25</sup> The language of

(Continued from previous page)

(Minnesota Declaratory Ruling). "We believe that interpreting the term 'legal requirement' broadly, best fulfills Congress' desire to ensure that states and localities do not thwart the development of competition." Id.

<sup>&</sup>lt;sup>22</sup> See, e.g., ALTS comments at 3-5; AT&T comments at 7-9; CTIA reply comments at 4; Minnesota PUC comments at 2; PCIA comments 4-5; Washington UTC reply comments at 3.

<sup>&</sup>lt;sup>23</sup> Western Wireless petition at 8.

<sup>&</sup>lt;sup>24</sup> See Minnesota Cellular Corporation's Petition for Designation as an Eligible Telecommunications Carrier, Order Granting Preliminary Approval and Requiring Further Filings, Docket No. P-5695/M-98-1285 (Oct. 27, 1999) (Minnesota PUC Order) at 7.

<sup>&</sup>lt;sup>25</sup> 47 U.S.C. § 214(e)(1).

the statute does not require the actual provision of service prior to designation.<sup>26</sup> We believe that this interpretation is consistent with the underlying congressional goal of promoting competition and access to telecommunications services in high-cost areas. In addition, this interpretation is consistent with the Commission's conclusion that a carrier must meet the section 214(e) criteria as a condition of its being designated an eligible carrier "and *then* must provide the designated services to customers pursuant to the terms of section 214(e) in order to receive support."<sup>27</sup>

- 15. In addition, we note that ETC designation only allows the carrier to become *eligible* for federal universal service support. Support will be provided to the carrier only upon the provision of the supported services to consumers.<sup>28</sup> We note that ETC designation prior to the provision of service does not mean that a carrier will receive support without providing service.<sup>29</sup> We also note that the state commission may revoke a carrier's ETC designation if the carrier fails to comply with the ETC eligibility criteria.
- 16. In addition, we believe the fact that a carrier may already be providing service within the state prior to designation is not conclusive of whether the carrier can reasonably be expected to provide service throughout the service area, particularly in high-cost areas, prior to designation. While a requirement that a carrier be providing service throughout the service area may not affect the provision of service in lower-cost areas, it is likely to have the effect of prohibiting the ability of carriers without eligibility for support to provide service in high-cost areas.<sup>30</sup>
- 17. <u>Gaps in Coverage</u>. We find the requirement that a carrier provide service to every potential customer throughout the service area before receiving ETC designation has the effect of prohibiting the provision of service in high-cost areas. As an ETC, the incumbent LEC is required to make service available to all consumers upon request, but the incumbent LEC may not have facilities to every possible consumer.<sup>31</sup> We believe the ETC requirements should be no

See, e.g., Western Wireless Corporation Designated Eligible Carrier Application, Findings of Fact, Conclusions of Law and Order, North Dakota Public Service Commission, Case No. PU-1564-98-428 (Dec. 15, 1999) (North Dakota Order); Minnesota PUC Order. See also Washington UTC reply comments at 3-5.

<sup>&</sup>lt;sup>27</sup> Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8876, 8853, para. 137 (1997), as corrected by Federal-State Joint Board on Universal Service, Erratum, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), aff'd in part, rev'd in part, remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393 (5<sup>th</sup> Cir. 1999) cert. granted, 120 S.Ct. 2214 (U.S. June 5, 2000) (No. 99-1244) (Universal Service Order) (emphasis in original).

<sup>&</sup>lt;sup>28</sup> Universal Service Order, 12 FCC Rcd 8853, para. 137.

<sup>&</sup>lt;sup>29</sup> Washington UTC reply comments at 4.

<sup>&</sup>lt;sup>30</sup> ALTS comments at 4-5.

<sup>&</sup>lt;sup>31</sup> See Minnesota PUC Order at 11, concluding that, "[a]ll carriers, but especially rural carriers, have pockets within their study areas where they have no customers or facilities. If development occurs, they have to build out to the new customer or customers. Minnesota Cellular appears to have the same build-out capacity as the (continued....)

different for carriers that are not incumbent LECs. A new entrant, once designated as an ETC, is required, as the incumbent is required, to extend its network to serve new customers upon reasonable request. We find, therefore, that new entrants must be allowed the same reasonable opportunity to provide service to requesting customers as the incumbent LEC, once designated as an ETC.<sup>32</sup> Thus, we find that a telecommunications carrier's inability to demonstrate that it can provide ubiquitous service at the time of its request for designation as an ETC should not preclude its designation as an ETC.

18. State Authority. Finally, although Congress granted to state commissions, under section 214(e)(2), the primary authority to make ETC designations, we do not agree that this authority is without any limitation.<sup>33</sup> While state commissions clearly have the authority to deny requests for ETC designation without running afoul of section 253, the denials must be based on the application of competitively neutral criteria that are not so onerous as to effectively preclude a prospective entrant from providing service. We believe that this is consistent with sections 214(e), 253, and 254, as well as the decision of the United States Court of Appeals for the Fifth Circuit in Texas Office of Public Utility Counsel v. FCC.<sup>34</sup> We reiterate, however, that the state commissions are primarily responsible for making ETC designations. Nothing in this Declaratory Ruling is intended to undermine that responsibility. In fact, it is our expectation that the guidance provided in this Declaratory Ruling will enable state commissions to move expeditiously, in a pro-competitive manner, on many pending ETC designation requests.

# B. Section 253(b) Analysis

# 1. Background

19. Section 253(b) preserves the state's authority to impose a requirement affecting

<sup>&</sup>lt;sup>32</sup> See, e.g., Minnesota PUC Order at 10-11; North Dakota Order at para. 36; Washington UTC reply comments at 5-6. See also South Dakota Circuit Court Order, Conclusions of Law at para. 12.

<sup>&</sup>lt;sup>33</sup> See, e.g., Coalition of Rural Telephone Companies comments at 12 (contending that state decisions under section 214(e) should not be reviewed under section 253); South Dakota PUC comments at 9 (contending that preemption may not be granted because the South Dakota PUC exercised a power lawfully delegated to it by Congress in a manner consistent with federal law).

<sup>&</sup>lt;sup>34</sup> See Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393, 418 n.31 (5<sup>th</sup> Cir. 1999) cert. granted, 120 S.Ct. 2214 (U.S. June 5, 2000) (No. 99-1244) ("if a state commission imposed such onerous eligibility requirements that no otherwise eligible carrier could receive designation, that state commission would probably run afoul of § 214(e)(2)'s mandate to 'designate' a carrier or 'designate' more than one carrier.").

the provision of telecommunications services in certain circumstances.<sup>35</sup> Section 253(b) allows states to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications service, and safeguard the rights of consumers.<sup>36</sup> Section 253(d) requires that we preempt such requirements unless we find that they meet each of the relevant criteria set forth in section 253(b). The Commission has preempted state regulations for failure to satisfy even one of the relevant criteria.<sup>37</sup>

#### 2. Discussion

- 20. We find that a requirement to provide the supported services throughout the service area prior to designation as an ETC does not fall within the "safe harbor" provisions of section 253(b). To the contrary, we find that this requirement is not competitively neutral, consistent with section 254, or necessary to preserve and advance universal service. We therefore find that a requirement that obligates new entrants to provide supported services throughout the service area prior to designation as an ETC is subject to our preemption authority under section 253(d).
- 21. <u>Competitive Neutrality</u>. We find that the requirement to provide service prior to designation as an ETC is not competitively neutral. We believe this finding is consistent with the Commission's determination in the *Universal Service Order* that "[c]ompetitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another." At the outset, we believe that, to meet the competitive neutrality requirement in non-rural telephone company service areas, the procedure for designating carriers as ETCs should be functionally equivalent for incumbents and new entrants. As discussed above, requiring the actual provision of supported services throughout the service area prior to ETC designation unfairly skews the universal service support mechanism in favor of the incumbent LEC. As a practical matter, the carrier most likely to be providing all the supported services throughout the requested designation area before ETC designation is the incumbent LEC. Without the

<sup>&</sup>lt;sup>35</sup> 47 U.S.C. § 253(b). Section 253(c) sets forth additional situations, which are not present here, in which a state or local government requirement that inhibits entry may still be acceptable.

<sup>&</sup>lt;sup>36</sup> 47 U.S.C. § 253(b).

For example, in *Silver Star*, the Commission preempted a Wyoming statute for its failure to satisfy the "competitive neutrality" criterion. *Silver Star*, 12 FCC Rcd at 15658-60, paras. 42, 45.

 $<sup>^{38}</sup>$  Universal Service Order, 12 FCC Rcd at 8801, para. 47.

We thus would be troubled by a process in which the incumbent LEC were able to self-certify that it meets the criteria for ETC designation, while new entrants were subject to a more rigorous, protracted state proceeding.

The 1996 Act required carriers to receive an eligible telecommunications carrier designation under section 214(e) to become eligible for federal high-cost support. 47 U.S.C. § 254(e).

assurance of eligibility for universal service funding, it is unlikely that any non-incumbent LEC will be able to make the necessary investments to provide service in high-cost areas.

- 22. We are not persuaded that such a requirement is competitively neutral merely because the requirement to provide service prior to ETC designation applies equally to both new entrants and incumbent LECs.<sup>41</sup> We recently concluded that the proper inquiry is whether the effect of the legal requirement, rather than the method imposed, is competitively neutral.<sup>42</sup> As discussed above, we find that the result of such a requirement is to favor incumbent LECs over new entrants. Unlike a new entrant, the incumbent LEC is already providing service and therefore bears no additional burden from a requirement that it provide service prior to designation as an ETC. We therefore find that requiring the provision of supported services throughout the service area prior to ETC designation has the effect of uniquely disadvantaging new entrants in violation of section 253(b)'s requirement of competitive neutrality.
- Service. We find that the requirement to provide service prior to designation as an ETC is not consistent with section 254 or "necessary to preserve and advance universal service." To the contrary, we find that such a requirement has the effect of prohibiting the provision of service in high-cost areas. As discussed above, this requirement clearly has a disparate impact on new entrants, in violation of the competitive neutrality and nondiscriminatory principles embodied in section 254. We believe that it is unreasonable to expect an unsupported carrier to enter a high-cost market and provide a service that its competitor already provides at a substantially supported price. If new entrants are not provided with the same opportunity to receive universal service support as the incumbent LEC, such carriers will be discouraged from providing service and competition in high-cost areas. Consequently, under an interpretation of section 214(e) that requires new entrants to provide service throughout the service area prior to designation as an

<sup>&</sup>lt;sup>41</sup> South Dakota PUC comments at 10; South Dakota Independent Telephone Coalition at 31.

<sup>&</sup>lt;sup>42</sup> Minnesota Declaratory Ruling at para. 51 (emphasis added). "We do not believe that Congress intended to protect the imposition of requirements that are not competitively neutral in their effect on the theory that the non-neutral requirement was somehow imposed in a neutral manner. Moreover, we do not believe that this narrow interpretation is appropriate because it would undermine the primary purpose of section 253 – ensuring that no state or locality can erect legal barriers to entry that would frustrate the 1996 Act's explicit goal of opening all telecommunications markets to competition."

<sup>&</sup>lt;sup>43</sup> 47 U.S.C. § 253(b).

<sup>&</sup>lt;sup>44</sup> Universal Service Order, 12 FCC Rcd at 8801, para. 48 ("We agree with the Joint Board that an explicit recognition of competitive neutrality in the collection and distribution of funds and determination of eligibility in universal service support mechanisms is consistent with congressional intent and necessary to promote a procompetitive, de-regulatory national policy framework.").

The Commission recognized that, in order to promote competition and the availability of affordable access to telecommunications service in high-cost areas, there must be a competitively neutral support mechanism for competitive entrants and incumbent LECs. *Universal Service Order*, 12 FCC Rcd at 8932, para. 287.

ETC, the benefits that may otherwise occur as a result of access to affordable telecommunications services will not be available to consumers in high-cost areas. We believe such a result is inconsistent with the underlying universal service principles set forth in section 254(b) that are designed to preserve and advance universal service by promoting access to telecommunications services in high-cost areas.<sup>46</sup>

24. A new entrant can make a reasonable demonstration to the state commission of its capability and commitment to provide universal service without the actual provision of the proposed service. There are several possible methods for doing so, including, but not limited to: (1) a description of the proposed supported by appropriate submissions; (2) a demonstration of the extent to which the carrier may otherwise be providing telecommunications services within the state service technology, as;<sup>47</sup> (3) a description of the extent to which the carrier has entered into interconnection and resale agreements;<sup>48</sup> or, (4) a sworn affidavit signed by a representative of the carrier to ensure compliance with the obligation to offer and advertise the supported services.<sup>49</sup> We caution that a demonstration of the capability and commitment to provide service must encompass something more than a vague assertion of intent on the part of a carrier to provide service. The carrier must reasonably demonstrate to the state commission its ability and willingness to provide service upon designation.

## C. Federal Preemption Authority

## 1. Background

- 25. State regulatory provisions may be preempted when enforcement of a state legal requirement conflicts with federal law or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Preemption may result not only from action taken by Congress, but also from a federal agency acting within the scope of its congressionally delegated authority.<sup>51</sup>
- 26. In section 254, Congress codified the Commission's historical policy of promoting universal service to ensure that consumers in all regions of the nation have access to

<sup>&</sup>lt;sup>46</sup> See 47 U.S.C. § 254(b).

<sup>&</sup>lt;sup>47</sup> See North Dakota Order at para. 39.

<sup>&</sup>lt;sup>48</sup> See North Dakota Order at para. 34.

<sup>&</sup>lt;sup>49</sup> Washington UTC reply comments at 5.

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984), citing Hines v. Davidowitz, 312 U.S. 57, 67 (1941); State Corporation Commission of Kansas v. FCC, 787 F.2d 1421, 1425 (10<sup>th</sup> Cir. 1986). See also Louisiana PSC, 476 U.S. at 368-69.

Louisiana PSC, 476 U.S. 368-69, citing Fidelity Federal Savings and Loan Assn. v. De la Cuesta, 458 U.S. 141; Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691.

telecommunications services.<sup>52</sup> Congress, recognizing that existing universal service support mechanisms were adopted in a monopoly environment, directed the Commission, in consultation with a federal-state Joint Board, to establish support mechanisms for the preservation and advancement of universal service in the competitive telecommunications environment that Congress envisioned.<sup>53</sup> Section 254(b) sets forth the underlying principles on which Congress directed the Commission to base policies for the preservation and advancement of universal service. These principles include the promotion of access to telecommunications services in rural and high-cost areas of the nation.<sup>54</sup> As noted above, consistent with the recommendation of the Joint Board, the Commission adopted the additional guiding principle of competitive neutrality.<sup>55</sup> In doing so, the Commission concluded that competitive neutrality will foster the development of competition and benefit certain providers, including wireless carriers, that may have been excluded from participation in the existing universal service mechanism.<sup>56</sup> Section 254(f) also provides that, "[a] State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service."<sup>57</sup>

## 2. Discussion

27. We find an interpretation of section 214(e)(1) that requires a new entrant to provide service throughout the service area prior to designation as an ETC to be fundamentally inconsistent with the universal service provisions in the 1996 Act. Specifically, we find such a requirement to be inconsistent with the meaning of section 214(e)(1), Congress' universal service objectives as outlined in section 254, and the Commission's policies and rules in implementing section 254. As discussed above, this approach essentially requires a new entrant to provide service throughout high-cost areas prior to its designation as an ETC. We find that such a requirement stands as an obstacle to the Commission's execution and accomplishment of the full objectives of Congress in promoting competition and access to telecommunications services in high-cost areas.<sup>58</sup> To the extent that a state's requirement under section 214(e)(1) that a new entrant provide service throughout the service area prior to designation as an ETC also involves

<sup>52</sup> See generally section 254.

According to the Joint Explanatory Statement, the purpose of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition..." Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 458, 104<sup>th</sup> Cong., 2d Sess. at 113 (Joint Explanatory Statement).

<sup>&</sup>lt;sup>54</sup> See 47 U.S.C. § 254(b)(3).

<sup>&</sup>lt;sup>55</sup> Universal Service Order, 12 FCC Rcd at 8801-8803, paras. 47-51.

<sup>&</sup>lt;sup>56</sup> Universal Service Order, 12 FCC Rcd at 8802, para. 49.

<sup>&</sup>lt;sup>57</sup> 47 U.S.C. § 254(f).

<sup>&</sup>lt;sup>58</sup> See Joint Explanatory Statement at 113.

matters properly within the state's intrastate jurisdiction under section 2(b) of the Act,<sup>59</sup> such matters that are inseparable from the federal interest in promoting universal service in section 254 remain subject to federal preemption.<sup>60</sup>

- 28. Section 214. We find that the requirement that a carrier provide service throughout the service area prior to its designation as an ETC conflicts with the meaning and intent of section 214(e)(1). Section 214(e)(1) provides that a common carrier designated as an eligible telecommunications carrier shall "offer" and advertise its services. The statute does not require a carrier to provide service prior to designation. As discussed above, we have concluded that a carrier cannot reasonably be expected to enter a high-cost market prior to its designation as an ETC and provide service in competition with an incumbent carrier that is receiving support. We believe that such an interpretation of section 214(e) directly conflicts with the meaning of section 214(e)(1) and Congress' intent to promote competition and access to telecommunications service in high-cost areas.
- 29. While Congress has given the state commissions the primary responsibility under section 214(e) to designate carriers as ETCs for universal service support, we do not believe that Congress intended for the state commissions to have unlimited discretion in formulating eligibility requirements. Although Congress recognized that state commissions are uniquely suited to make ETC determinations, we do not believe that Congress intended to grant to the states the authority to adopt eligibility requirements that have the effect of prohibiting the provision of service in high-cost areas by non-incumbent carriers.<sup>63</sup> To do so effectively undermines congressional intent in adopting the universal service provisions of section 254.
- 30. Section 254. Consistent with the guidance provided above, we find a requirement that a carrier provide service prior to designation as an ETC inconsistent with the underlying principles and intent of section 254. Specifically, section 254 requires the Commission to base policies for the advancement and preservation of universal service on principles that include promoting access to telecommunications services in high-cost and rural areas of the nation. Because section 254(e) provides that only a carrier designated as an ETC under section 214(e) may be eligible to receive federal universal service support, an interpretation of section 214(e) requiring carriers to provide service throughout the service area prior to designation as an ETC

<sup>&</sup>lt;sup>59</sup> 47 U.S.C. § 152(b).

<sup>&</sup>lt;sup>60</sup> See Louisiana Public Service Commission v. FCC, 476 U.S. at 368-69; AT&T v. Iowa Utilities Board, 119 S.Ct 721, 730 (1999); Texas Office of Public Utility Counsel v. FCC, 183 F.3d at 423.

<sup>61 47</sup> U.S.C. § 214(e)(1).

<sup>&</sup>lt;sup>62</sup> See Joint Explanatory Statement at 113. See also supra section III.B for discussion of competitive neutrality.

 $<sup>^{63}\,</sup>$  See Texas Office of Public Utility Counsel v. FCC, 183 F.3d at 418 n.31.

<sup>&</sup>lt;sup>64</sup> See 47 U.S.C. § 254(b)(3).

stands as an obstacle to the accomplishment of the congressional objectives outlined in section 254.<sup>65</sup> If new entrants are effectively precluded from universal service support eligibility due to onerous eligibility criteria, the statutory goals of preserving and advancing universal service in high-cost areas are significantly undermined.

In addition, such a requirement conflicts with the Commission's interpretation of section 254, specifically the principle of competitive neutrality adopted by the Commission in the Universal Service Order. 66 In the Universal Service Order, the Commission stated that, "competitive neutrality in the collection and distribution of funds and determination of eligibility in universal service support mechanisms is consistent with congressional intent and necessary to promote a pro-competitive, de-regulatory national policy framework."67 As discussed above, a requirement to provide service throughout the service area prior to designation as an ETC violates the competitive neutrality principle by unfairly skewing the provision of universal service support in favor of the incumbent LEC. As stated in the Universal Service Order, "competitive neutrality will promote emerging technologies that, over time, may provide competitive alternatives in rural, insular, and high cost areas and thereby benefit rural consumers."68 Requiring new entrants to provide service throughout the service area prior to ETC designation discourages "emerging technologies" from entering high-cost areas. addition, we note that section 254(f) provides that, "[a] State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service." For the reasons discussed extensively above, we find an interpretation of section 214(e) requiring the provision of service throughout the service area prior to designation as an ETC to be inconsistent with the Commission's universal service policies and rules.

<sup>&</sup>lt;sup>65</sup> 47 U.S.C. § 254(e).

<sup>66</sup> Universal Service Order, 12 FCC Rcd at 8801, para. 47.

<sup>&</sup>lt;sup>67</sup> Universal Service Order, 12 FCC Rcd at 8801-02, para. 48 (emphasis added).

<sup>&</sup>lt;sup>68</sup> Universal Service Order, 12 FCC Rcd at 8803, para. 50.

<sup>&</sup>lt;sup>69</sup> 47 U.S.C. § 254(f).

## IV. ORDERING CLAUSES

- 32. Accordingly, IT IS ORDERED that pursuant to sections 4(i), 253, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 253, and 254, and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, and Article VI of the U.S. Constitution, that this Declaratory Ruling IS ADOPTED.
- 33. IT IS FURTHER ORDERED that Western Wireless' Petition for Preemption of an Order of the South Dakota Public Utilities Commission shall be placed in abeyance pending resolution of the appeal.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Secretary Roman

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# DISSENTING STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: Federal-State Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling, CC Docket No. 96-45.

I dissent from today's Declaratory Ruling. It is not necessary for the Commission to issue this advisory statement, and its ruling is inconsistent with section 253's plain mandate and with past Commission precedent interpreting that provision. Indeed, the Commission rests its section 253 analysis upon a factual predicate that does not exist. Moreover, the South Dakota PUC has permissibly interpreted section 214(e)(1), and it is inappropriate for the Commission to override the PUC's determination.

This Declaratory Ruling Is Unnecessary. To begin with, there is no need for the Commission to issue an advisory statement concerning the South Dakota Public Utilities Commission's decision. A South Dakota trial court has vacated the PUC's order, and an appeal is currently pending in the South Dakota Supreme Court. There is no reason to think that the state supreme court will not appropriately resolve the issue. Further, contrary to the Commission's assertions, this order will be of no assistance to other state commissions. No other state commissions have interpreted section 214 in the way that the South Dakota PUC has done, nor have other state commissions indicated that they plan to adopt the South Dakota PUC's interpretation of section 214. There is therefore no need for the Commission to offer "guidance" on this issue.

The Commission Has Improperly Applied Section 253. Not only is the Commission's ruling unnecessary, but also its preemption analysis is faulty. Oddly, although the Commission claims that the purpose of this order is to "provide guidance to remove uncertainty and terminate controversy regarding whether section 214(e)(1) . . . requires a common carrier to provide supported services throughout a service area prior to being designated an eligible telecommunications carrier," it devotes the bulk of its discussion to preemption under section 253.

First, even if it were appropriate for the Commission to issue a statement regarding its understanding of section 214(e) – which it is not – there is no reason for it also to address section 253 preemption. Moreover, by issuing an advisory statement regarding section 253, the Commission wades into dangerous waters. Section 253(d) specifies that the Commission should

<sup>&</sup>lt;sup>1</sup> See Federal-State Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling, CC Docket No. 96-45, at ¶ 3 (hereinafter "Declaratory Ruling"); Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier, Findings of Fact, Conclusions of Law, and Order, Civ. 99-235 (S.D. Sixth Jud. Cir. March 22, 2000).

<sup>&</sup>lt;sup>2</sup> See Declaratory Ruling at  $\P$  1.

<sup>&</sup>lt;sup>3</sup> Declaratory Ruling at  $\P$  1.

preempt state regulations only "to the extent necessary to correct . . . a violation or inconsistency [with sections 253(a) and (b)]." In view of this statutory directive, it is inappropriate for the Commission to issue any advisory statement regarding section 253. Quite simply, how can it be "necessary" for the Commission to act to correct a violation of sections 253(a) or (b) where, as here, a court has vacated the state PUC's order, and no state requirement even exists?

Even assuming that the South Dakota PUC's order presented an issue that could appropriately be addressed under section 253, the Commission's application of that provision to South Dakota's requirement is inconsistent with the statute's plain language. Section 253(a) proscribes only those state requirements that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."<sup>4</sup> It is impossible to understand how failing to assign a new carrier eligible telecommunications carrier status could "prohibited" or had the "effect of prohibiting" it from providing service in South Dakota. The Declaratory Ruling asserts that "[a] new entrant faces a substantial barrier to entry if the incumbent local exchange carrier (LEC) is receiving universal service support that is not available to the new entrant for serving customers in high-cost areas." 5 Amazingly, however, the order leaves out the fact that in the non-rural areas of South Dakota, the incumbent does not receive federal universal support for any of the non-rural lines it serves. In other words – and contrary to the linchpin of the Commission's reasoning here – designation as an ETC confers no benefit at all upon the non-rural incumbent carrier that has received that status, and there is no factual basis for concluding that another carrier's lack of ETC status could have the effect of prohibiting that carrier from offering service.

To be sure, incumbent carriers that serve rural areas in South Dakota do receive some federal universal service support. But whether to designate more than one carrier as an ETC in these rural areas lies *entirely* within the South Dakota PUC's discretion, and I do not understand the majority to question that principle, which is dictated by the 1996 Act and our precedent. A state commission remains free to decline to grant an applicant ETC status for rural areas, based on public interest considerations, and this order can have no effect on its exercise of that discretion.

In addition to being incompatible with section 253's plain language, the Commission's interpretation of this provision is not consistent with this agency's precedent. The Commission

<sup>&</sup>lt;sup>4</sup> See 47 U.S.C. § 253(a) (emphasis added).

<sup>&</sup>lt;sup>5</sup> Declaratory Ruling at ¶ 12.

<sup>&</sup>lt;sup>6</sup> See 47 U.S.C. §214(e)(2) ("Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an areas served by a rural telephone company... designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of [§ 214(e)(1)].") (emphasis added); Federal-State Joint Board On Universal Service, 12 FCC Rcd 8776 [¶ 135] (1997) ("[T]he discretion afforded a state commission under section 214(e)(2) is the discretion to decline to designate more than one eligible carrier in an area that is served by a rural telephone company; in that context, the state commission must determine whether the designation of an additional eligible carrier is in the public interest.").

pretends that its prior decisions support its preemption of the South Dakota PUC's order. But an examination of the facts of these cases demonstrates just the opposite. In its past decisions, the Commission has indicated that section 253 preemption is appropriate only if a state requirement is so burdensome it effectively precludes a provider from providing service, and it previously has refused to preempt state requirements that fall short of that standard.<sup>7</sup>

For example, the majority cites *Pittencrieff Communications, Inc.* as support for its preemption analysis here. <sup>8</sup> But the Commission did *not* preempt the Texas requirement at issue in that case, which required all carriers, including the petitioner, a commercial mobile radio service provider operating in Texas, to contribute to the state universal service fund. <sup>9</sup> The Commission ruled that the requirement did not prohibit a CMRS provider from entering the market since it applied to *all* telecommunications providers operating in Texas. <sup>10</sup> Indeed, the logic applied in *Pittencrieff* compels the conclusion that preemption is inappropriate here – the South Dakota PUC's requirement that, in order to qualify as an eligible telecommunications carrier under section 214(e), a carrier must currently be providing service to subscribers, applies to incumbents and new entrants alike. <sup>11</sup>

The Commission's decision is also at odds with its recent decision rejecting Minnesota's petition for a declaration that its contract with a fiber optics developer was permissible under the 1996 Act. Under the contract at issue, the developer was to receive exclusive access to freeway rights-of-way in Minnesota in exchange for installing 1,900 miles of fiber optic cable and allowing the state to use some of that cable. For procedural reasons, the Commission did not preempt Minnesota's contract. Nevertheless, it determined that the contract posed grave problems under section 253, in that it gave a single developer what amounted to a monopoly on freeway rights-of-way. The contract would essentially have precluded later entrants from gaining access to the freeway rights-of-way to lay their own fiber optic cable for ten years, and it would have been prohibitively expensive for competitors to purchase alternative rights-of-way. In view of these facts, the Commission determined that the agreement potentially ran afoul of section 253 because it singled out one provider for preferential treatment, while effectively

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<sup>&</sup>lt;sup>7</sup> See, e.g., The Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way, Memorandum Opinion and Order, CC Docket No. 98-1, ¶ 32 (rel. Dec. 23, 1999) (hereinafter "Minnesota Declaratory Ruling").

<sup>&</sup>lt;sup>8</sup> Declaratory Ruling at  $\P$  7.

<sup>&</sup>lt;sup>9</sup> See Pittencrieff, 13 FCC Rcd 1735 [¶ 2].

<sup>&</sup>lt;sup>10</sup> See id. at 1751-1752, ¶ 32.

 $<sup>^{11}</sup>$  See Declaratory Ruling at ¶ 23.

 $<sup>^{12}</sup>$  See Minnesota Declaratory Ruling, supra note 21, at  $\P$  64.

<sup>13</sup> See id. at ¶¶ 1 & 19.

 $<sup>^{14}</sup>$  See id. at  $\P\P$  22-36.

prohibiting others from entering the market altogether. Similarly, in *New England Public Communications Council Petition for Preemption Pursuant to Section 253*, <sup>15</sup> a state requirement had the effect of completely preventing independent payphone providers from entering the payphone market, in direct contravention of section 276 of the 1996 Act. <sup>16</sup> Consistent with section 253(a), the Commission preempted the requirement.

The South Dakota PUC, by contrast, has not accorded preferential treatment to any carrier. Rather, it has simply directed that a carrier that wishes to be designated an eligible telecommunications carrier under section 214 show that it currently provides service in the areas in which it seeks ETC status. Even if ETC status conferred some benefit on a carrier (which it clearly does not), I do not understand how a generally applicable rule such as this one could "prohibit" or have the "effect of prohibiting" the ability of a carrier to provide telecommunications services within the meaning of section 253.

The South Dakota PUC's Construction of Section 214(e) Is Permissible. The South Dakota PUC, in ruling that a carrier may not receive ETC designation unless it currently provides service throughout the service area, has permissibly construed section 214(e)(1). That provision states that a common carrier designated as an eligible telecommunications carrier "shall, throughout the service area for which the designation is received . . . offer the services that are supported by Federal universal service support mechanisms under section 254(c). The verbs "shall" and "offer" are used the present tense, and the South Dakota PUC reasonably concluded that these terms mean that a carrier must presently offer its service throughout the service area before it may be designated an ETC and may not merely intend to offer that service at some point in the future. Although other state commissions might interpret section 214(e)(1) differently, the South Dakota PUC's interpretation of that provision is clearly permissible.

Indeed, in order to override the South Dakota PUC's determination and reach the outcome it prefers, the Commission must manufacture a far more strained definition of the term "to offer." "To offer," the Commission reasons, has nothing to do with whether an entity actually provides service or is immediately capable of providing that service upon a customer's request. The Commission stretches the statute's language past the breaking point. If Congress had intended for carriers to be eligible telecommunications carriers based simply on a readiness to provide service, it could easily have said so. And the Commission's construction of section 214(e)(1) effectively reads out of the Act one of the provision's chief requirements. If carriers may qualify for ETC status based merely on their "readiness" to make service available, section 214(e)(1) becomes nothing more than a self-certification provision, a result that is plainly at odds with the statute's intent. It is elementary that a construction that renders a statutory provision superfluous must be avoided, and the Commission has ignored that principle here.<sup>18</sup>

<sup>15 11</sup> FCC Rcd 19713 (1996) (hereinafter "New England Public Communications").

<sup>&</sup>lt;sup>16</sup> See New England Public Communications, 11 FCC Rcd at 19726-19727 [¶¶ 27-30].

<sup>&</sup>lt;sup>17</sup> 47 U.S.C § 214(e).

<sup>&</sup>lt;sup>18</sup> See, e.g., Kawaauhau v. Geiger, 523 U.S. 57, 62 118 S.Ct. 974, 977 (1998); United States v. Menasche, 348 U.S. 528, 538-539, 75 S.Ct. 513, 519-520 (1955). (continued....)

\* \* \* \* \*

Because the Commission's decision is unnecessary, inconsistent with sections 253, and improperly overrides the South Dakota PUC's application of section 214(e), I dissent from this Declaratory Ruling.

(Continued from previous page) -

## Federal Communications Commission Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the State Independent Alliance and the	)	
Independent Telecommunications Group for a	)	
Declaratory Ruling that the Basic Universal	)	WT-Docket No. 00-239
Service Offering Provided by Western Wireless in	)	
Kansas is Subject to Regulation as Local Exchange	)	
Service	)	
	)	

## MEMORANDUM OPINION AND ORDER

Adopted: June 4, 2002

Released: August 2, 2002

By the Commission: Commissioner Abernathy concurring and issuing a statement; Commissioner Martin dissenting and issuing a statement.

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APPENDIX: List of Commenters

## I. INTRODUCTION

1. On November 3, 2000, the State Independent Alliance and Independent Telecommunications Group (Independents)<sup>1</sup> filed a petition for declaratory ruling (Independents'

<sup>&</sup>lt;sup>1</sup> Independents include 37 independent rural telephone companies, all of the independent rural telephone companies operating in Kansas. Independents' Petition at 1.

Petition) requesting that the Commission clarify that Western Wireless' Basic Universal Service (BUS) offering in Kansas is not a Commercial Mobile Radio Service (CMRS) and, therefore, that federal law does not preempt or preclude the Kansas Corporation Commission (Kansas Commission) from applying to the BUS offering those regulations and Universal Service Fund (USF) requirements applicable to wireline local exchange carriers (LECs) and to eligible telecommunications carriers (ETCs) in Kansas. Independents also request that the Commission advise the Kansas Commission that the BUS offering is subject to federal LEC regulation. In this order, we deny Independents' Petition because we conclude that Western Wireless' BUS is a CMRS offering. Therefore, Kansas may not regulate BUS entry or rates and may not require equal access for telephone toll services, although it may regulate the other terms and conditions of BUS. We further clarify that Western Wireless is not subject to federal regulation as a LEC with respect to the BUS offering.

#### II. BACKGROUND

## A. CMRS Classification

2. Section 3(27) of the Communications Act of 1934, as amended,<sup>6</sup> defines a "mobile service," in pertinent part, as "radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves." The Commission has a long history of regulating mobile radio services for the purpose of encouraging the growth of the mobile services industry so that consumers will have greater options for meeting their communications needs.<sup>8</sup> In 1993, Congress amended section 332 of the Act to define a "commercial mobile service" as "any mobile service (as defined in section 3) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." Congress created the commercial mobile service classification in order to ensure consistent treatment of functionally similar mobile services at an appropriate level of regulation and establish a competitive nationwide market for CMRS with limited

<sup>&</sup>lt;sup>2</sup> Western Wireless is a provider of cellular telecommunications services operating under the name of Cellular One in 19 states. Western Wireless Comments at 2.

<sup>&</sup>lt;sup>3</sup> Independents' Petition at 19 (requesting that the Commission "declare that Western Wireless' BUS offering in Kansas is not CMRS and that federal law does not prohibit or preempt Kansas from applying to it the same regulations and USF requirements that generally apply to all local exchange carriers' services").

<sup>&</sup>lt;sup>4</sup> *Id*.

<sup>&</sup>lt;sup>5</sup> See 47 U.S.C. §§ 332(c)(3), 332(c)(8).

<sup>&</sup>lt;sup>6</sup> 47 U.S.C. §§ 151 et seq. (the Communications Act or the Act).

<sup>&</sup>lt;sup>7</sup> 47 U.S.C. §153(27).

<sup>&</sup>lt;sup>8</sup> Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1414, ¶ 3 (1994) (CMRS Second Report and Order).

<sup>&</sup>lt;sup>9</sup> See Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Public Law No. 103-66, Title VI, §§ 6002(b)(2)(A), 6002(b)(2)(3), 107 Stat. 312, 392 (1993) (1993 Amendments)); 47 U.S.C § 332(d)(1). In place of the statutory term "commercial mobile service," the Commission uses the term CMRS. See 47 C.F.R. § 20.3 (defining CMRS).

regulation.10

- 3. In 1994, in the CMRS Second Report and Order, the Commission revised its wireless service rules to implement the new statutory provisions governing CMRS.<sup>11</sup> In the CMRS Second Report and Order, the Commission generally distinguished mobile from fixed wireless services for purposes of implementing section 332.<sup>12</sup> The Commission held that "services provided through dual-use equipment... capable of transmitting while the platform is moving" are mobile.<sup>13</sup> On the other hand, the Commission held that services "provided to or from a transportable platform that cannot move when the communications service is offered should not be included" in mobile service.<sup>14</sup>
- 4. The Commission subsequently amended its rules in the *CMRS Flex Order* to allow CMRS carriers to provide fixed wireless services on a co-primary basis with commercial mobile services.<sup>15</sup> The Commission reasoned that this rule change would allow the carriers greater flexibility to provide innovative wireless services to meet consumers' demands. The Commission also concluded that permitting fixed services on a co-primary basis with mobile services would stimulate wireless competition in the local exchange market.<sup>16</sup> The Commission's decision to allow co-primary fixed use of CMRS spectrum raised the related issue of how such fixed service offerings should be classified for regulatory purposes. In the *Second CMRS Flex Order*, the Commission concluded that because of the evolving nature of fixed and hybrid wireless services, it would decide the regulatory treatment of such services on a case-by-case basis.<sup>17</sup> The Commission offered that to the extent a party requires a determination of whether or not a particular service that includes a fixed wireless component should be treated as CMRS, that party should petition for a declaratory ruling.<sup>18</sup>
- 5. In addition to the co-primary offering of fixed wireless services authorized in the CMRS Flex Order, the Commission has long permitted CMRS providers to offer services that are ancillary, auxiliary, or incidental to their primary mobile offerings, without change to their regulatory

<sup>&</sup>lt;sup>10</sup> See CMRS Second Report and Order, 9 FCC Rcd at 1417-19, ¶¶ 13-17.

<sup>11</sup> See generally, id., 9 FCC Rcd 1411.

 $<sup>^{12}</sup>$  Id. at 1424-25, ¶¶ 36, 38.

 $<sup>^{13}</sup>$  *Id.* at 1425, ¶ 38.

<sup>&</sup>lt;sup>14</sup> Id. See also 47 C.F.R. § 20.9(a), (a)(7).

<sup>&</sup>lt;sup>15</sup> Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96-6, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8965, 8977, ¶ 24 (1996) (*CMRS Flex Order*). By not having any thresholds or ceilings on the relative levels of fixed or mobile services associated with the term "co-primary," the Commission allowed providers to choose to provide exclusively fixed services, exclusively mobile service, or any combination of the two. *Id*.

<sup>&</sup>lt;sup>16</sup> *Id*. at 8967, ¶ 3.

Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Service, WT Docket No. 96-6, Second Report and Order and Order on Reconsideration, 15 FCC Rcd 14680, 14683, ¶7, 14687, ¶15 (2000) (Second CMRS Flex Order).

<sup>&</sup>lt;sup>18</sup> *Id.* at 14683, ¶ 8.

classification.<sup>19</sup> Pursuant to section 22.323, the provision of incidental services by Part 22 licensees is expressly authorized subject to certain conditions intended to protect mobile cellular service and its subscribers.<sup>20</sup> These conditions include: (a) the costs and charges of subscribers who do not wish to use incidental services are not increased as a result of provision of incidental services to other subscribers; (b) the quality of the primary public mobile service does not materially deteriorate as a result of provision of incidental services, and neither growth nor availability of the primary public mobile service is significantly diminished as a result of provision of incidental services; and (c) the provision of the incidental services is not inconsistent with the Communications Act of 1934, as amended, or with the Commission's rules and policies. In the *CMRS Second Report and Order*, the Commission concluded that fixed services that are ancillary or auxiliary to CMRS would be regulated as CMRS.<sup>21</sup> In the *Second CMRS Flex Order*, the Commission reaffirmed that ancillary, auxiliary, and incidental services offered by CMRS providers are regulated as CMRS.<sup>22</sup>

6. Pursuant to section 332(c)(3), state or local governments may not, with very limited exceptions, regulate the entry of or the rates charged by CMRS providers.<sup>23</sup> States may, however, regulate other terms and conditions of CMRS,<sup>24</sup> such as customer billing practices and consumer protection requirements.<sup>25</sup> States may also impose on CMRS providers requirements related to universal service, although such requirements may not constitute rate or entry regulation.<sup>26</sup> In addition, a CMRS

<sup>&</sup>lt;sup>19</sup> See, e.g., 47 C.F.R. §§ 20.7(g), 20.9(a), 22.323.

<sup>&</sup>lt;sup>20</sup> 47 C.F.R. § 22.323. See also 47 C.F.R. § 22.901(d)(2) (exempting alternative technology and co-primary fixed services from the requirements of §22.323). We are currently considering in another proceeding whether to revise or eliminate these conditions on the provision of incidental services, and indeed whether the explicit authorization of incidental service in section 22.323 remains necessary at all in light of the Commission's subsequent granting of broader flexibility to cellular and other CMRS providers in the CMRS Flex proceeding (WT Docket No. 96-6). See Year 2000 Biennial Regulatory Review – Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services, WT Docket No. 01-108, Notice of Proposed Rulemaking, 16 FCC Rcd 11169, 11171, ¶ 5 (2001) (Part 22 Biennial Review NPRM).

<sup>&</sup>lt;sup>21</sup> CMRS Second Report and Order, 9 FCC Rcd at 1424, ¶36.

 $<sup>^{22}</sup>$  Second CMRS Flex Order, 15 FCC Rcd at 14684,  $\P$  9; see also CMRS Flex Order, 11 FCC Rcd at 8985,  $\P$  48.

<sup>&</sup>lt;sup>23</sup> 47 U.S.C. § 332(c)(3). A state may petition for authority to regulate CMRS rates if it can demonstrate that either of two conditions is met: "(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State." 47 U.S.C. § 332(c)(3)(A).

<sup>&</sup>lt;sup>24</sup> 47 U.S.C. § 332(c)(3).

<sup>&</sup>lt;sup>25</sup> Southwestern Bell Mobile Systems, Inc., Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, 14 FCC Rcd 19898, 19901, ¶ 7 (1999) (Southwestern Bell Petition), citing H-R Rep. No. 103-111, 103<sup>rd</sup> Congress, 1<sup>st</sup> Sess. 211, 261, reprinted at 1993 U.S.C.C.A.N. 378, 588.

<sup>&</sup>lt;sup>26</sup> Pittencrieff Communications Inc. Petition for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995, 13 FCC Rcd 1735, 1748, ¶ 25 (1997) (Pittencrieff Communications), aff'd sub nom. CTIA v. FCC, 168 F.3d 1332 (D.C. Cir. 1999). In addition, notwithstanding the prohibition against state rate (continued....)

provider may not be required to provide equal access to common carriers for the provision of telephone toll services.<sup>27</sup>

7. CMRS providers generally are not subject to regulation as LECs even if they provide telephone exchange and exchange access services.<sup>28</sup> The Commission may define CMRS providers that offer local exchange service as LECs under section 153(26), but it has not taken that action.<sup>29</sup> Thus, CMRS providers are not subject to the statutory requirements imposed on LECs in section 251(b) of the Act or on incumbent LECs in section 251(c).<sup>30</sup> The Commission has, however, extended by regulation requirements similar to some of those in section 251(b) to CMRS providers.<sup>31</sup> In addition, the Commission has forborne from applying many of the requirements in the Act to both CMRS providers and competitive LECs (CLECs) based on their lack of market power.<sup>32</sup>

## B. Western Wireless' BUS Offering

8. BUS is described and marketed by Western Wireless as wireless local loop service or Wireless Residential Service, a substitute for local exchange service designed to compete with traditional wireline local exchange service.<sup>33</sup> The BUS offering is provided over Western Wireless' cellular facilities as one of its cellular offerings.<sup>34</sup> Western Wireless charges a flat rate of \$14.99 per month for

(Continued from previous page) and entry regulation of CMRS, where CMRS is a substitute for landline telephone exchange service for a substantial portion of the communications within a state, a state may enforce requirements "imposed on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates." 47 U.S.C. § 332(c)(3).

<sup>&</sup>lt;sup>27</sup> 47 U.S.C. § 332(c)(8).

<sup>&</sup>lt;sup>28</sup> See 47 U.S.C. § 153(26) (defining LEC as "any person that is engaged in the provision of telephone exchange service or exchange access," but "such term [LEC] does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term.").

<sup>&</sup>lt;sup>29</sup> *Id. See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, First Report and Order, 11 FCC Rcd 15499, 15995-96, ¶ 1004 (1996) (*Local Competition Order*) (declining to classify CMRS providers as LECs).

<sup>&</sup>lt;sup>30</sup> 47 U.S.C. §§ 251(b), (c).

<sup>&</sup>lt;sup>31</sup> See Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, First Report and Order, 11 FCC Rcd 18455, 18468, ¶21 (1996) (imposing resale requirements on an interim basis until November 2002). See also Cellular Telecommunications Industry Association's Petition for Forbearance From Commercial Mobile Radio Services Number Portability Obligations, WT Docket No. 98-229, Order on Reconsideration, 15 FCC Rcd 4727 (2000) (imposing certain number portability service provider requirements on wireless carriers in the top 100 MSAs effective November 24, 2002).

<sup>&</sup>lt;sup>32</sup> See Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers, WT Docket No. 98-100, First Report and Order, 15 FCC Rcd 17414, 17425-26, ¶ 26 (2000).

<sup>&</sup>lt;sup>33</sup> Western Wireless Comments at 4-5, Exhibit C.

<sup>&</sup>lt;sup>34</sup> *Id.* at 3-4. Western Wireless states that BUS is transmitted over the same frequencies as Western Wireless' other cellular offerings (824 MHz–899 MHz) using the same towers, transmitters, receivers, and other equipment. *Id.* at (continued....)

the BUS offering, which includes unlimited local calls and an expanded local calling area.<sup>35</sup> Outside the local calling area, BUS users incur roaming charges on the same basis as other cellular customers. Using the wireless access unit, a BUS subscriber can make calls in portions of eastern Kansas without incurring roaming charges, and in other areas of the country while incurring roaming charges.<sup>36</sup>

9. The BUS subscriber receives service through a Telular terminal (wireless access unit),<sup>37</sup> a laptop-sized unit owned by Western Wireless, which provides a dial tone and to which the customer connects a conventional telephone.<sup>38</sup> Some of the wireless access units can also be used to connect fax and computer equipment.<sup>39</sup> The wireless access unit is powered by electricity from an electrical outlet or by battery,<sup>40</sup> and can be used with or without an external antenna.<sup>41</sup> The wireless access unit is approximately 2.76 inches x 12.9 inches x 11.8 inches<sup>42</sup> and weighs 8.3 pounds including the built-in battery.<sup>43</sup> The battery provides up to one hour of talk time and eight hours of standby time.<sup>44</sup> The unit can be operated while in motion (e.g., in a car or truck) using battery power.<sup>45</sup> The unit operates at 3 watts, which is more powerful than conventional cellular hand-held units, but is similar in power and degree of mobility to early cellular "bag phones."<sup>46</sup>

### C. Independents' Petition

customers. Id. at 4, n. 4.

35 Id. at 3.

<sup>&</sup>lt;sup>36</sup> Letter from Angela E. Giancarlo, Counsel for Western Wireless, to Magalie Roman Salas, Secretary, FCC, dated May 18, 2001 (Western Wireless May 18 Letter) at 2-4.

<sup>&</sup>lt;sup>37</sup> The Telular product description for Phonecell SX3i states that it contains "[e]verything you need in a sleek package. The Phonecell SX for AMPS [Advanced Mobile Phone System] Fixed Wireless Terminal provides access to home, office, or any remote location where phone service is needed and cellular networks are available." The SX3i includes a roaming option. Independents' Petition at Attachment C.

<sup>&</sup>lt;sup>38</sup> Western Wireless Comments at 4.

<sup>&</sup>lt;sup>39</sup> *Id*.

<sup>&</sup>lt;sup>40</sup> Id.

<sup>&</sup>lt;sup>41</sup> Western Wireless Reply at 4, n. 11. The wireless access unit comes with a short antenna; a larger high gain antenna for exterior mounting on a building is optional.

<sup>&</sup>lt;sup>42</sup> Independents Reply at 10, n. 38.

<sup>&</sup>lt;sup>43</sup> Letter from Angela E. Giancarlo, Counsel for Western Wireless, to Magalie Roman Sales, Secretary, FCC, dated May 8, 2001 (Western Wireless May 8 Letter) at 2.

<sup>&</sup>lt;sup>44</sup> Id.

<sup>&</sup>lt;sup>45</sup> Western Wireless Comments at 20; Western Wireless May 8 Letter at 3-6.

<sup>&</sup>lt;sup>46</sup> Independents' Petition, Attachment D, Kansas Hearing, Testimony of James Blundell, Western Wireless at 63; Western Wireless Comments at 4.

declaratory ruling requesting that the Commission find that Western Wireless' BUS offering is subject to regulation as a local exchange service provided by a LEC, not as a mobile service provided by a CMRS provider.<sup>47</sup> Independents state that Western Wireless' BUS offering is a fixed service, intended as a substitute for wireline telephone service, and not a mobile service within the meaning of the Act and the Commission's rules.<sup>48</sup>

- Independents further note that the Kansas Commission has designated Western Wireless as an ETC for non-rural and rural areas for the provision of BUS, enabling Western Wireless to receive universal service funds in those areas.<sup>49</sup> Thus, Independents argue that both as a matter of statutory interpretation and to ensure that Western Wireless is subject to regulation similar to that applicable to the carriers with which it competes and to other recipients of universal service funds, the Commission should find that Western Wireless is not a CMRS provider when it offers BUS.<sup>50</sup> Independents state that in designating Western Wireless an ETC, the Kansas Commission assumed that BUS is CMRS and therefore is not subject to certain regulations.<sup>51</sup> Independents identify five areas of Kansas regulation as being of particular concern: certificate of public convenience and authority, equal access, customers' ability to list their numbers in white pages directories, determining the service location for USF purposes when the customer is mobile, and internet access at a minimum data transmission speed of 19.2 kbps.<sup>52</sup>
- 12. In addition, Independents request that in order to end confusion and controversy regarding the status of the BUS offering in Kansas and other states, the Commission clarify that USF requirements and LEC regulations apply to that offering in Kansas.<sup>53</sup> Independents also request that the

<sup>&</sup>lt;sup>47</sup> Independents' Petition at 19.

<sup>&</sup>lt;sup>48</sup> *Id.* at 10-11.

<sup>&</sup>lt;sup>49</sup> *Id.* at 3-4. *See* Order #6 Granting Sprint PCS and Western Wireless ETC Designation in Non-Rural Telephone Company Wire Center for Federal Universal Service Support Purposes, Kansas Commission Docket Nos. 99-GCCZ-156-ETC and 99-SSLC-173-ETC (Jan. 19, 2000) and Order #7 On Reconsideration, Kansas Commission Docket Nos. 99-GCCZ-156-ETC and 99-SSLC-173-ETC (February 29, 2000). Independents' Petition at 2, Attachment H. On October 12, 2001, the Kansas Commission further designated Western Wireless an ETC for its provision of BUS in rural areas of Kansas. Kansas Commission, Order on Petition of Western Wireless for Designation as an Eligible Telecommunications Carrier, Docket No. 99-GCCZ-156-ETC (October 12, 2001) (*Kansas Rural ETC Designation Order*). Independents state that they are seeking reconsideration of that decision. Letter from John B. Adams, Counsel for Independents, to Magalie Roman Sales, Secretary, FCC, dated November 6, 2001 (Independents November 6 Letter) at 1.

<sup>&</sup>lt;sup>50</sup> Independents also argue that even if Western Wireless' BUS is a CMRS offering, it should be subject to LEC regulation because Western Wireless offers the service as a substitute for wireline service for a substantial portion of the state and because BUS is a universal service offering. Independents' Petition at 18, n. 48.

<sup>&</sup>lt;sup>51</sup> *Id.* at 14-16. In designating Western Wireless as an ETC in rural areas, the Kansas Commission expressly declined to reach a conclusion regarding whether the BUS offering is CMRS. *Kansas Rural ETC Designation Order* at 7, ¶ 15.

<sup>&</sup>lt;sup>52</sup> Independents' Petition at 14-16. The Commission has subsequently adopted rules designating the mobile customer's billing address as the basis for determining the customer's location for the purpose of delivery of high-cost universal service support. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking,16 FCC Rcd 11244, 11314-15, ¶¶ 180-81 (2001).

<sup>&</sup>lt;sup>53</sup> Independents' Petition at v, 19; Independents Reply at 19-20.

Commission clarify that because BUS is a LEC service, Western Wireless is subject to federal regulations applicable to CLECs when it provides BUS.<sup>54</sup>

- 13. In response to a public notice seeking comment on Independents' Petition, eighteen parties filed comments and eleven parties filed replies.<sup>55</sup> Western Wireless opposes the Petition, arguing that BUS is a mobile service regulated as CMRS, not a LEC service. Western Wireless argues that BUS should be regulated as CMRS because it is inextricably linked with Western Wireless' other cellular offerings,<sup>56</sup> and that even viewed in isolation, BUS satisfies the Commission's definition of mobile service because of the mobility afforded to subscribers.<sup>57</sup> Western Wireless asserts that BUS can also be viewed as incidental, ancillary, or auxiliary to Western Wireless' traditional cellular service.<sup>58</sup> Western Wireless further argues that Congress has established that CMRS providers of local exchange service shall be regulated differently from incumbents because they do not have market power, and that CMRS providers are not potentially subject to state and federal regulation until CMRS provides a substantial portion of the communications in a state.<sup>59</sup>
- 14. The Kansas Commission takes no position on the merits of Independents' Petition, but supports clarification of whether the BUS offering is CMRS under federal law and, if so, whether the BUS offering is excepted from the preemption set forth in section 332(c)(3)(A) of the Act.<sup>60</sup> The Kansas Commission clarifies that only incumbent LECs are required to comply with the 19.2 kbps internet access requirement. In addition, the Kansas Commission clarifies that Western Wireless intends to work with LECs for publication of BUS customer numbers in the LECs' white pages.<sup>61</sup>

## III. DISCUSSION

15. We deny Independents' Petition because we conclude that BUS is a CMRS offering. We conclude that BUS is properly classified as CMRS for two independently sufficient reasons: (1) it meets the definition of "mobile" service under the statute and the Commission's rules; and (2) it is ancillary, auxiliary, or incidental to Western Wireless' provision of traditional cellular service. Thus, under section

<sup>&</sup>lt;sup>54</sup> Independents' Petition at 16-17. Independents argue, for example, that Western Wireless is subject to the requirements of section 251(b), which is applicable to LECs. *Id.* at 19.

<sup>&</sup>lt;sup>55</sup> See Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling that Western Wireless' Basic Universal Service in Kansas is Subject to Regulation as Local Exchange Service, Docket No. 00-239, Public Notice, DA 00-2622 (rel. Nov. 21, 2000). Parties filing comments and reply comments in this proceeding are listed in the Appendix.

<sup>&</sup>lt;sup>56</sup> Western Wireless Comments at 13-15.

<sup>&</sup>lt;sup>57</sup> *Id.* at 16-17.

<sup>58</sup> Id.; Western Wireless Reply at 4.

<sup>&</sup>lt;sup>59</sup> Western Wireless Comments at 26-27. Western Wireless notes that in order for a state successfully to petition for relief from the preemption provision in section 332(c)(3), there must be a showing that a CMRS provider has such market dominance that customers are not protected from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory. *Id.* at 26, n.57.

<sup>&</sup>lt;sup>60</sup> Kansas Commission Comments at 4.

<sup>&</sup>lt;sup>61</sup> *Id.* at 2-3.

332(c) of the Act, Kansas may not regulate BUS rates and entry or impose equal access requirements on BUS, although it may regulate other terms and conditions of BUS.<sup>62</sup> We also clarify that none of the exceptions to the proscription of state rate regulation in section 332(c)(3) apply, and that Western Wireless is not subject to federal LEC regulation when providing BUS.

## A. Classification of Western Wireless' BUS Offering as CMRS

16. Mobility of the BUS Offering. The analysis of whether BUS should be classified as CMRS begins with the statutory definition of "commercial mobile service." In section 332 of the Act, Congress defined commercial mobile service as "any mobile service (as defined in section 3) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." Section 3(27) of the Communications Act defines a "mobile service," in pertinent part, as "radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves." Section 3(28) of the Communications Act in turn defines a "mobile station" as "a radio-communication station capable of being moved and which ordinarily does move." The definition of mobile station and the pertinent language in the definition of mobile service were included in the Communications Act of 1934 when it was adopted. Congress did not make any relevant changes to

"a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio communications services, (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (C) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled 'Amendment to the Commission's Rules to Establish New Personal Communications Services' (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding."

47 U.S.C. § 153(27). We note that while the Senate initially proposed expressly to exclude fixed wireless service from the statutory definition of mobile services, the House definition, which did not expressly exclude fixed services, was ultimately adopted. *See* H.R. Conf. Rep. No. 103-213 (1993) (Conference Report) at 497.

<sup>65</sup> 47 U.S.C. § 153(28). "Radio communication" is defined in section 3(33) of the Act as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. § 153(33).

<sup>66</sup> The definition of mobile station was originally adopted in the 1927 International Radiotelegraph Convention (1927 Convention). The 1927 Convention also defined fixed station as a "station permanently located and communicating with one or more stations similarly located." See 45 Stat. 2848. Thus, the 1927 Convention distinguished a fixed station, which does not move and is permanently located, from a mobile station that is capable of moving and ordinarily does move.

Mobile service was defined in the Act in 1934 to mean, "the radio-communication service carried on between mobile stations and land stations, and by mobile stations communicating among themselves." (continued....)

<sup>62 47</sup> U.S.C. §§ 332(c)(3), 332(c)(8).

<sup>63 47</sup> U.S.C. § 332(d)(1); see also 47 C.F.R. § 20.3 (defining CMRS).

<sup>&</sup>lt;sup>64</sup> Mobile service is defined in section 3(27) of the Act as:

either of these definitions in the 1993 or the 1996 Amendments to the Act. 67

- Applying the statutory definition of mobile station to the BUS offering, we conclude, based on all the facts before us, that Western Wireless' BUS offering is a mobile service and thus CMRS. 68 The statutory definition of mobile station has two prongs: (1) it is capable of being moved: and (2) it ordinarily does move. As Independents acknowledge, there is no question that the BUS offering meets the first prong of the definition.<sup>69</sup> The wireless access unit used to provide BUS operates much like a conventional cellular telephone in that it is not limited to operating at a fixed location.<sup>70</sup> described by Western Wireless, the wireless access unit can be "picked up, placed in a car, rolled down the road and taken to the barn."<sup>71</sup> This capability distinguishes BUS from fixed services such as Basic Exchange Telephone Radio Systems (BETRS), as well as the services commonly offered over the Local Multipoint Distribution Service (LMDS), Digital Electronic Messaging Service (DEMS), and 39 GHz bands. Independents and other parties argue that BUS is like BETRS because of the nature of the service, because BUS provides the last mile to the customer, and because the BUS wireless access unit is similar in size to the BETRS transceiver and has backup batteries but is not primarily battery-powered.<sup>73</sup> We agree, however, with Western Wireless that the key difference between BETRS and BUS is that the radio equipment used to provide BETRS is limited to a specific location and can only operate at that location.74 Thus, the equipment used to provide BETRS, unlike BUS, does not satisfy the first prong of the definition of mobile station.

<sup>&</sup>lt;sup>67</sup> See 1993 Amendments; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat.56, codified at 47 U.S.C. §§ 151 et seq. (1996 Amendments).

<sup>&</sup>lt;sup>68</sup> There is no question that the BUS offering satisfies the other elements of CMRS set forth in section 332(d)(1) of the Act and in section 20.3 of the Commission's rules. See 47 U.S.C. § 332(d)(1); 47 C.F.R. § 20.3.

<sup>&</sup>lt;sup>69</sup> Independents' Petition at v; Independents Reply at 17.

<sup>&</sup>lt;sup>70</sup> Western Wireless May 18 Letter at 2.

<sup>&</sup>lt;sup>71</sup> Western Wireless Comments at 20-21.

<sup>&</sup>lt;sup>72</sup> In the CMRS Second Report and Order, the Commission concluded that BETRS is a fixed service subject to potential rate regulation as LEC service. See CMRS Second Report and Order, 9 FCC Rcd at 1425, ¶38 ("the substitution of a radio loop for a wire loop in the provision of BETRS does not constitute mobile service."). See also Status of Radio and Equipment Used in the Basic Exchange Telephone Service, Memorandum Opinion and Order, 4 FCC Rcd 2224, 2224-25 ¶¶ 4, 7 (CCB 1989) (BETRS Equipment Order); Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service, GEN Docket No. 87-390, Report and Order, 3 FCC Rcd 7033, 7041, ¶66 (1988) (Auxiliary Cellular Services Order).

<sup>&</sup>lt;sup>73</sup> Independents' Petition at 10-11; NTCA Comments at 1-3; South Dakota Independents Comments at 2; Staurulakis Comments at 8-9.

<sup>&</sup>lt;sup>74</sup> Western Wireless Comments at 19; RTG Comments at 4 n. 6; see CMRS Second Report and Order, 9 FCC Rcd at 1425, ¶ 38.

with the second prong of the definition of mobile station, based on uncontradicted evidence in the record as a whole that mobile operation is an intended and actual use of the BUS equipment and service. First, the record indicates that the BUS equipment is not only capable of moving, but is specifically designed to operate while in motion with the same seamless hand-off capability as any other cellular phone. Second, Western Wireless has presented evidence that its representatives demonstrate the mobility of BUS to customers, and that under the terms of the BUS offering, customers are allowed unlimited use within Western Wireless' local service area as well as roaming on Western Wireless' system outside the local service area. Third, Western Wireless has provided evidence of actual mobile use by BUS customers who have incurred roaming charges, thus demonstrating that the customers have used the service while away from home.

- 19. Taking all these facts together, we find that there is sufficient evidence in the record to support the conclusion that the BUS terminal equipment meets the second prong of the statutory definition. The fact that the BUS unit is capable of operating while moving is a significant indicator that mobile use is an intended "ordinary" use, because otherwise Western Wireless would have had no reason to invest in equipment with cellular hand-off capability. Western Wireless' express provision for mobility and roaming in the terms of service similarly supports our conclusion. <sup>79</sup> Finally, the fact that customers have used the service on a roaming basis provides evidence that mobile use is not out of the ordinary. Indeed, the customer bills provided by Western Wireless may understate actual mobile use, because they only reflect roaming use outside of Western Wireless' local service area, which covers most of eastern Kansas, and do not measure mobile use by BUS customers within the local service area. <sup>80</sup>
- 20. We emphasize that our holding is a narrow one based on the particular facts in the record before us. If, for example, the customer's ability to move and operate a wireless unit were limited either by a lack of technical capability in the unit or by restrictions on mobility imposed by the service provider, such facts could raise significant additional issues about whether the service was mobile. Nevertheless, we reject the Independents' argument that meeting the second prong of the statutory test requires an affirmative showing that customers usually or typically use the wireless unit while mobile. The record indicates that the BUS unit is capable of both fixed and mobile use, and that while some customers use

<sup>75</sup> Western Wireless Comments at ii, 2-4; Western Wireless May 18 Letter at 2-4.

<sup>&</sup>lt;sup>76</sup> Western Wireless May 8 Letter at 3-4.

<sup>&</sup>lt;sup>77</sup> Western Wireless May 18 Letter at 2-4.

<sup>&</sup>lt;sup>78</sup> Western Wireless May 8 Letter at 3-4.

<sup>&</sup>lt;sup>79</sup> We note, for example, that in North Dakota, Western Wireless initially used a service agreement that prohibited movement of the wireless access unit by the customer. Western Wireless subsequently deleted that requirement, and that requirement does not exist in the Kansas BUS offering. State of North Dakota, Public Service Commission, Case No. PU-1564-99-17, Findings of Fact, Conclusions of Law and Order on Remand, November 22, 2000 at 2. Nebraska Independents state that in Nebraska the mobile portion of Western Wireless' BUS-like offering is limited to a defined community. Nebraska Independents Comments at 3. The Nebraska Commission, however, noted the benefits of mobility available to subscribers from the service. Application No. C–1889 of GCC License Corporation seeking designation as an eligible telecommunications carrier (ETC) that may receive universal service support, Nebraska Public Service Commission, Nov. 21, 2000 at 8, ¶ 35 (Nebraska Order), aff'd State of Nebraska, Public Service Commission v. Arlington Telephone Company, No. S-01-343, June 28, 2002.

<sup>&</sup>lt;sup>80</sup> Western Wireless May 18 Letter at 2-4.

the mobile features of the BUS service, others may not. However, if we were to classify the service as fixed or mobile based on how individual customers choose to use their units, such an approach would be unworkable from a regulatory standpoint because the subjective and varying behavior of particular customers could alter the regulatory status of the service. In addition, classifying BUS as a fixed offering based on the assumption that most actual use is fixed, as the Independents advocate, would discount the mobility that is an inherent part of the service offering. Therefore, instead of analyzing customer usage patterns, we conclude that the second prong of the statutory test is met if mobile operation is an inherent part of the service offering that is reasonably likely and not an extraordinary or aberrational use of the equipment. The record evidence presented by Western, which is not disputed by the Independents, meets this standard.

Our conclusion that the BUS service meets the statutory definition of a mobile service is also supported by Commission rules and precedent. Although the Commission has never expressly interpreted the statutory language, it has developed, in decisions and rules adopted over a long period of time, certain criteria for defining what is "mobile," consistent with the Act. In numerous rule provisions adopted over many years, the Commission has consistently defined mobile station to require that the station operate while moving or from unspecified locations, as an objective means of distinguishing a fixed station that operates from one specific location. For example, a mobile station that is used in a cellular service, as are the stations at issue in this proceeding, is defined in section 22.99 of the Commission's rules as "one or more transmitters that are capable of operation while in motion." The Commission's rules of general applicability similarly define mobile station as a "station in the mobile service intended to be used while in motion or during halts at unspecified points." In the CMRS Second Report and Order, the Commission concluded that "services provided through dual-use equipment . . . capable of transmitting while the platform is moving" are included as mobile. The example the Commission provided was the Inmarsat-M terminal, which is capable of operation while in motion.

<sup>&</sup>lt;sup>81</sup> See Western Wireless Comments at 20-21.

<sup>&</sup>lt;sup>82</sup> Independents' Petition at v; Independents Reply at 17; Staurulakis Reply at 11-12.

<sup>&</sup>lt;sup>83</sup> Many of these rules were in place when Congress established the CMRS classification and redefined mobile service in 1993 and adopted the 1996 Amendments to the Act, and Congress did not change the Commission's definition of mobile station.

<sup>&</sup>lt;sup>84</sup> 47 C.F.R. § 22.99.

<sup>&</sup>lt;sup>85</sup> 47 C.F.R. § 2.1. See also 47 C.F.R. §§ 24.5 (Personal Communications Services), 25.201(Satellite Communications), and 101.3 (Fixed Microwave Services). The definition in section 2.1 of the Commission's rules was adopted by the Radio Regulations annexed to the 1947 International Telecommunications Convention ratified by the United States in 1949. 63 Stat. 1399. By contrast, section 2.1 defines fixed service as "[a] radio communication service between specified fixed points." 47 C.F.R. § 2.1.

<sup>&</sup>lt;sup>86</sup> CMRS Second Report and Order, 9 FCC Rcd at 1425, ¶ 38; see also CMRS Flex Order, 11 FCC Rcd at 8969, ¶7.

<sup>&</sup>lt;sup>87</sup> CMRS Second Report and Order, 9 FCC Rcd at 1425, ¶ 38. The Inmarsat mobile earth station or Inmarsat-M terminal is defined at Article 1(i) of the amended text of the Inmarsat Convention as an "earth station in the mobile-satellite service intended to be used while in motion or during halts at unspecified points." See Communications Satellite Corporation Applications for Authority to Provide International Land Mobile-Satellite Services Outside of North America via the Inmarsat System, Memorandum Opinion, Order and Certificate, 8 FCC Rcd 638, 639, ¶5 & n.7 (1993). The Inmarsat-M terminal is larger than the mini Inmarsat-M terminal, which is described as laptop-sized. (continued....)

the CMRS Flex Order, the Commission stated that a mobile service "allows the end user to communicate while moving to or from different locations," while "fixed service requires the end user to be at a set location." None of these rules or precedents suggests a definition of mobility that depends on how most customers actually use a piece of equipment or service.

We also disagree with Independents and other commenters who argue that the BUS unit is too large and difficult to move to be considered a mobile station. We do not find that the unit's size or relative inconvenience compared to a conventional cellular handset precludes our finding that BUS is a mobile offering. The BUS unit has dimensions and weight comparable to a laptop computer or to older model car phones and bag phones, all of which are expressly designed for mobile use. Indeed, although the size of mobile cellular customer equipment has decreased over time due to improvements in technology, older and bulkier cellular equipment remains classified as mobile notwithstanding the more compact equipment in prevalent use today. Moreover, the Commission continues to recognize that equipment similar in size to the BUS unit can be classified as mobile. For example, in 1996 the Commission approved the use of laptop-sized mini Inmarsat-M terminals to provide satellite mobile service.

(Continued from previous page)
Both terminals are used in the mobile satellite service. See Application of Comsat Corporation for Authority under
Section 504(c) of the International Maritime Satellite Telecommunications Act of 1978 and Section 214 of the
Communications Act of 1934, as amended, to Provide its Authorized Inmarsat Services via the Inmarsat Third
Generation Communications Satellites, File Nos. ITC 95-422, CSS-94-012, Memorandum Opinion and Order, 11
FCC Rcd 7953, 7966, ¶ 34 (1996) (Inmarsat-M Order).

<sup>&</sup>lt;sup>88</sup> CMRS Flex Order, 11 FCC Rcd 8969, ¶ 6, n. 13. See also Amendment of Parts 2 and 87 of the Commission's Rules to Provide for the Licensing of Radionavigation Land Test Stations, Docket No. 15579, Memorandum Opinion and Order, 1 FCC 2d 773, 774, ¶ 5 (1965) (finding that a station that is "authorized for and restricted to a specific geographical location, such as a landing area or manufacturer's plant' is considered to be at a fixed location and therefore does not comply with the definition of mobile station: "one that basically is used while in motion or during halts at unspecified points.").

<sup>&</sup>lt;sup>89</sup> Independents' Petition at 8-10. See also Beacon Comments at 3 (arguing that the service agreement for BUS filed with the Kansas Commission states that BUS customer premises transmission will be at adequate volume and free of excessive distortions at the customer's residence, and repair is at the customer's residence); Staurulakis Reply at 11-13 (arguing that the BUS wireless access unit is not a mobile station because it is intended ordinarily to be used while plugged into an electric outlet and because the unit has no handle, earpiece, speaker, or mouthpiece, and thus cannot be used without additional attached equipment); South Dakota Independents Comments at 3-5; Townes Reply at 4.

<sup>&</sup>lt;sup>90</sup> Western Wireless Comments at 18. Western Wireless notes that analog bag phones that are bulky and have a limited battery capacity are considered CMRS. *Id.* at 19. *See also* Independents' Petition, Attachment D, Kansas Hearing, Testimony of James Blundell at 63.

<sup>&</sup>lt;sup>91</sup> Dobson Comments at 4; Western Wireless Comments at 4.

<sup>&</sup>lt;sup>92</sup> Early cellular "bag phones" could be moved from one location to another and used for standby and limited online operation. *See* Regis J. (Bud) Bates & Donald W. Gregory, *Voice & Data Communications Handbook* 833 (McGraw-Hill 3<sup>rd</sup> Ed. 2000) (*Voice & Data Communications Handbook*).

<sup>&</sup>lt;sup>93</sup> Inmarsat-M Order, 11 FCC Rcd at 7966, ¶ 34. Western Wireless notes that satellite telephony classified as CMRS relies on bulky equipment. Western Wireless Comments at 18, citing CMRS Second Report and Order, 9 FCC Rcd at 1457-58, ¶109. Independents argue that the Inmarsat-M unit, unlike BUS, is intended to and does (continued....)

- 23. Independents also argue that the purpose of BUS is to substitute for local exchange service, and therefore it must be a fixed service and regulated as a LEC service. For example, Independents argue that BUS is marketed as a fixed service, which shows Western Wireless' intent. Independents also argue that Western Wireless does not intend BUS to be mobile because BUS is priced (\$14.99) such that it would "cannibalize" Western Wireless' mobile service offering. In addition, Independents assert that the wireless access unit is network equipment owned by Western Wireless, not customer equipment. We do not find these arguments compelling. As discussed above, the Commission has already concluded that the provision of local exchange service by a wireless carrier does not make the carrier a LEC, and Congress exempted from the definition of LEC the provision of local exchange service by CMRS providers. Moreover, service using conventional cellular equipment also is sometimes marketed as a substitute for wireline local exchange service, and such offerings are clearly mobile. For example, Leap Wireless and US Cellular provide flat rate mobile local service as a substitute for wireline local telephone service.
- 24. Independents further argue that BUS should not be regulated as a CMRS offering because Western Wireless has requested USF support for the BUS offering. We note that the requirements for designation as an ETC providing universal service are set forth in the Act and in the

<sup>&</sup>lt;sup>94</sup> Independents' Petition at 6-7, 17. See also USTA Comments at 4 (arguing that it is the nature of the service that determines the classification); NTCA Comments at 2 & n.4; Williamson Reply at 5.

<sup>&</sup>lt;sup>95</sup> Independents Reply at 12-14. Western Wireless argues that its name for the service to alert customers that it is a substitute for land line service is not determinative of the service type. Western Wireless Comments at 20. Western Wireless states that in marketing BUS to customers, the mobility of the wireless access unit "is most definitely a selling point." Western Wireless May 8 Letter at 3.

<sup>&</sup>lt;sup>96</sup> Independents Reply at 11. But see Western Wireless Reply at 2-3 (arguing that BUS is one of several cellular service offerings and that the important factor is that the BUS offering is mobile).

<sup>&</sup>lt;sup>97</sup> Independents' Petition at 8, n. 19. *But see* Western Wireless Comments at 13 (noting that cellular providers can bundle customer equipment with their services).

<sup>&</sup>lt;sup>98</sup> Local Competition Order, 11 FCC Rcd at 15995-96, ¶ 1004; 47 U.S.C. § 153(26). The legislative history of section 332(c)(3)(A) indicates that the mere showing that a CMRS carrier is providing a substitute for landline service is not sufficient to support LEC regulation. The Conference Report states that "the Commission should permit States to regulate radio service providers for basic telephone service if subscribers have no alternative means of obtaining basic telephone service." Conference Report at 493.

<sup>&</sup>lt;sup>99</sup> CMRS carriers providing substitute local exchange service using conventional cell phones include: Sprint PCS, U.S. Cellular, Leap Wireless International, ALLTEL, and Rural Cellular. See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, 16 FCC Rcd 13350, 13382-83 (2001); see also Cellco Partnership d/b/a Bell Atlantic Mobile Petition for Designation as an Eligible Telecommunications Carrier, 15 FCC Rcd 39 (CCB 2000) (designating Verizon Wireless an ETC); Western Wireless Reply at 6 n. 17; Dobson Comments at 3.

<sup>&</sup>lt;sup>100</sup> Independents' Petition at 18; RUS Comments at 3.

Commission's orders.<sup>101</sup> In the *Universal Service* proceeding, the Commission concluded that telecommunications carriers that provide universal service as delineated in the Commission's rules are eligible to receive USF, regardless of the technology used to provide the service.<sup>102</sup> Thus, a telecommunications carrier, including a wireless carrier, can be designated by a state or the Commission as an ETC whether it provides a fixed or a mobile universal service offering if it complies with the requirements for designation as an ETC. Pursuant to these rules, the Common Carrier Bureau has granted Western Wireless ETC status in Wyoming for a BUS-like universal service offering.<sup>103</sup>

25. Finally, we note that Kansas and other states have treated the provision of BUS and similar services by Western Wireless as CMRS for regulatory purposes. Although the Kansas Commission has declined to resolve the legal question of whether the BUS offering is mobile, in practical effect Kansas is currently treating Western Wireless' provision of BUS as a CMRS offering. North Dakota has concluded that a similar service provided by Western Wireless is mobile, and many other states have treated Western Wireless as a CMRS provider when it provides BUS-like services. In

<sup>&</sup>lt;sup>101</sup> Pursuant to section 214(e), the *Universal Service Order* requires that to be designated an ETC a telecommunications carrier must offer and advertise the services supported by the federal universal service support mechanism through the designated service areas. 47 U.S.C. §214(e)(1). Pursuant to section 254(c), the Commission has defined those services that are to be supported by the federal universal service mechanism. Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8790, ¶22 (1997) (*Universal Service Order*).

<sup>&</sup>lt;sup>102</sup> Universal Service Order, 12 FCC Rcd at 8858, ¶ 145 (stating that "any telecommunications carrier using any technology, including wireless technology, is eligible to receive universal service support if it meets the criteria under section 214 (e)(1)"). With regard to equal access requirements for telecommunications carriers, the Commission did not include equal access to interexchange service among the services supported by universal service support mechanisms, concluding that such a requirement "would be contrary to the mandate of section 332(c)(8), which prohibits any requirement that CMRS providers offer 'equal access to common carriers for the provision of toll services." Id. at 8819, ¶ 78.

Telecommunications Carrier in the State of Wyoming, CC Docket 96-45, Memorandum Opinion and Order, 16 FCC Rcd 48, 53, ¶ 11 (CCB 2000) (Wyoming Order) (granting Western Wireless ETC status in Wyoming and rejecting the implication that services offered by CMRS providers are ineligible for universal service support), recon. denied, 16 FCC Rcd 19144 (2001); see also Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota, CC Docket 96-45, Memorandum Opinion and Order, 16 FCC Rcd 18133 (2001) (granting Western Wireless ETC status to provide service to the Pine Ridge Reservation in South Dakota).

<sup>&</sup>lt;sup>104</sup> Kansas Commission Comments at 1; Western Wireless Comments at 5-6. States treat providers of local exchange service differently if they are not CMRS. In Iowa, for example, CLECs must obtain a certificate of public convenience and necessity, provide a service map, and file a tariff. Rural Iowa Independents Comments at 3. In Nebraska, CLECs are subject to rate benchmarks and earnings oversight. Nebraska Independents Comments at 4. See also Minnesota Independents Comments at 4.

<sup>&</sup>lt;sup>105</sup> Western Wireless Comments at 12.

As of August 17, 2001, Western Wireless had been granted ETC status in nonrural areas of twelve states and had been granted ETC status in rural areas of eight states, none of which is regulating Western Wireless as a LEC. Western Wireless Comments at 5-6 & nn. 6-7, 12 & n. 23; Letter from Angela E. Giancarlo, Counsel for Western Wireless, to Magalie Roman Salas, Secretary, FCC, dated Aug. 17, 2001, at Exhibit 1. The North Dakota Commission concluded that BUS "has mobile capabilities and is therefore mobile service." Western Wireless (continued....)

this proceeding, neither Kansas nor any other state filed comments supporting the Independents' Petition.

- 26. Ancillary, Auxiliary, or Incidental Nature of the BUS Offering. We also conclude that even if BUS were not considered to meet the statutory definition of "mobile," it is still properly classified as CMRS because it is ancillary, auxiliary, or incidental to Western Wireless' provision of traditional mobile cellular service. Section 22.323 of the Commission's rules specifically authorizes cellular and other Public Mobile Service carriers to use their authorized stations to provide other communications services incidental to the primary public mobile service for which the authorizations were issued. Section 22.323 provides that these carriers may provide incidental services if:
  - (a) The costs and charges of subscribers who do not wish to use incidental services are not increased as a result of provision of incidental services to other subscribers;
  - (b) The quality of the primary public mobile service does not materially deteriorate as a result of provision of incidental services, and neither growth nor availability of the primary public mobile service is significantly diminished as a result of provision of incidental services; and
  - (c) The provision of the incidental services is not inconsistent with the Communications Act of 1934, as amended, or with FCC rules and policies.

### 47 C.F.R. §22.323.

27. We conclude that the Western Wireless BUS offering meets the criteria set forth in section 22.323, and is classifiable as an incidental service under Part 22. 108 BUS is provided over the same spectrum and infrastructure that Western Wireless uses to provide conventional mobile cellular service, and is in all respects the same as conventional mobile cellular service except for the customer equipment. 109 Western's cellular network does not distinguish operationally among BUS units and other

(Continued from previous page)

Comments at 11 & nn. 21, 22, citing Wireless Corp v. Telephone Cooperative, Inc. Complaint, NDPSC Case No. PU 1564-99-17, Finding of Fact, Conclusions of Law and Order (August 31, 1999), aff'd on remand, Findings of Fact, Conclusions of Law and Order on Remand (Nov. 22, 2000). The North Dakota Supreme Court affirmed the North Dakota Commission, concluding that Western Wireless' BUS-like offering in North Dakota is a mobile CMRS offering under the Commission's rules and interpretations. Consolidated Telephone Cooperative v. Western Wireless, 2001 WL 1658195 (ND). In addition, in Minnesota and Nebraska Western Wireless' universal service offerings are regulated as CMRS. Minnesota Independents Comments at 4; Nebraska Independents Comments at 2. The Nebraska Commission concluded that Western Wireless' offering provided the benefits of mobility. See Nebraska Order at 8, 13, ¶ 35.

<sup>&</sup>lt;sup>107</sup> See Western Wireless Comments at 6, 13; Western Wireless Reply at 4; Sprint Comments at 7, 15-16; AT&T Wireless Comments at 3-4; US Cellular Reply at 3-4; Letter from Caressa D. Bennet, General Counsel, RTG, to Magalie Roman Salas, Secretary, FCC, dated April 26, 2001, at 2; RTG Comments at 5; CTIA Reply at 2.

As noted above, we are currently considering in the *Part 22 Biennial Review* proceeding whether to revise or eliminate section 22.323 in light of the Commission's subsequent granting of broader flexibility to cellular and other CMRS providers in the *CMRS Flex* proceeding. *See supra* note 20. Even if we were to eliminate the rule, however, the criteria specified in the rule would remain relevant to our evaluation of whether BUS service is properly classified as incidental. Thus, if Western provided service over PCS spectrum, which is not a Part 22 service subject to section 22.323, we would find BUS to be incidental based on the same analysis we apply here.

See Western Wireless Comments at 6, 13; Western Wireless Reply at 4. Western Wireless states that BUS and all its other cellular offerings use the same antennas, cell sites, towers, trunk lines, mobile switching centers, and interconnection facilities. Western Wireless Comments at 4, n. 4.

types of customer equipment, enabling BUS customers to send and receive calls throughout the Western Wireless service area and to roam much like customers that take other cellular packages from Western Wireless. Moreover, BUS serves a minimal number of subscribers (386 or 0.835 percent) in comparison to approximately 45,000 traditional mobile cellular customers on Western's Kansas system. BUS has few subscribers relative to Western's conventional cellular service, and the BUS equipment is indistinguishable to the network from other customer equipment, it is unlikely that provision of BUS would lead to diminution in the quality of service, an increase in costs, or other adverse effects on Western Wireless' primary cellular offerings.

- 28. It is also well-established that if the criteria set forth in the incidental services rule are met, a service provided by a cellular licensee can be treated as incidental for regulatory purposes even if the service is entirely fixed. In *Westcom*, the Commission specifically held that fixed cellular service could be provided as an incidental service. <sup>112</sup> In the *Second CMRS Flex Order*, the Commission reaffirmed its consistent holding that fixed services provided by CMRS providers over CMRS spectrum on an auxiliary, ancillary, or incidental basis are regulated as CMRS. <sup>113</sup> Thus, even if we were to assume that BUS is a fixed rather than a mobile service, it would not affect our conclusion that the service is incidental, and therefore is properly regulated as CMRS.
- 29. On all the facts of this case, we conclude that BUS is incidental to Western Wireless' principal cellular service. We reject claims that BUS is not an ancillary, auxiliary, or incidental service because Western Wireless receives universal service funds for its provision of the BUS offering or because Western Wireless advertises BUS as a standalone product. Although ETC status is a prerequisite to the receipt of universal service funding, it is not relevant to whether a service is CMRS or LEC service for regulatory purposes. Moreover, advertising does not establish the regulations that apply to a service.

#### B. Effects of CMRS Classification

30. Pursuant to section 332(c)(3)(A), states may not regulate the entry or rates of CMRS providers. Thus, states are prohibited from requiring CMRS providers to obtain a certificate of public

<sup>&</sup>lt;sup>110</sup> Western Wireless Comments at 4.

<sup>&</sup>lt;sup>111</sup> Id. at 2-3. See also RTG Comments at 4; Sprint Comments at 6-8.

<sup>&</sup>lt;sup>112</sup> Westcom Products, Inc., 102 FCC 2d 470, 472-73, ¶ 5, 475, ¶ 10 (1985) (Westcom).

<sup>&</sup>lt;sup>113</sup> See Second CMRS Flex Order, 15 FCC Rcd at 14684, ¶ 9; CMRS Flex Order, 11 FCC Rcd at 8968-8969, ¶¶ 5-7; see also Auxiliary Cellular Services Order, 3 FCC Rcd at 7041, ¶ 66 (incidental services may include fixed services); CMRS Second Report and Order, 9 FCC Rcd at 1424, ¶ 36 (all auxiliary and ancillary services provided by mobile service licensees are included within the definition of mobile services).

<sup>&</sup>lt;sup>114</sup> Independents Reply at 4, 6. See also Staurulakis Reply at 4.

<sup>&</sup>lt;sup>115</sup> Universal Service Order, 12 FCC Rcd at 8802, ¶ 49 (a common carrier using any technology, including CMRS, may qualify for designation so long as it complies with the section 214(e) eligibility criteria).

<sup>&</sup>lt;sup>116</sup> 47 U.S.C. § 332(c)(3)(A).

convenience and necessity or regulating CMRS rates.<sup>117</sup> In addition, states are precluded from requiring CMRS providers to provide equal access to common carriers for the provision of telephone toll services.<sup>118</sup> States may, however, regulate other terms and conditions of CMRS.<sup>119</sup>

- 31. Independents argue that Western Wireless should be subject to the same universal service requirements as CLECs in Kansas. Unless the requirements imposed by the Kansas Commission are entry, rate, or equal access regulations, the Kansas Commission is not prevented from applying such requirements to CMRS ETCs consistent with the Act and the Commission's universal service regulations. Congress specified in section 254 of the Act the principles that should be used in establishing universal service policies. We do not have a record here to determine whether specific universal service regulations that the Kansas Commission may choose to impose constitute prohibited rate or entry regulations. 123
- 32. Independents suggest that even if we conclude that BUS is CMRS, Western Wireless should be subject to state regulation as a LEC for the BUS offering. Section 332(c)(3)(A) provides for state rate regulation of CMRS upon petition if the state demonstrates that either of two conditions is met:

<sup>&</sup>lt;sup>117</sup> Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Order and Opinion, and Further Notice of Proposed Rulemaking, Promoting Deployment and Subscribership in Unserved and Underserved Areas, 15 FCC Rcd 12208, 12262, ¶ 110 (2000).

<sup>&</sup>lt;sup>118</sup> 47 U.S.C. § 332(c)(8).

<sup>119 47</sup> U.S.C. § 332(c)(3)(A). See generally Southwestern Bell Petition, 14 FCC Rcd 19898 (the CMRS industry is not exempt from the neutral application of state contractual or consumer fraud laws); Wireless Consumers Alliance, Inc., Petition for a Declaratory Ruling Concerning Whether the Provision of the Communications Act of 1934, as Amended, or the Jurisdiction of the Federal Communications Commission Thereunder, Serve to Preempt State Courts from Awarding Monetary Relief Against Commercial Mobile Radio Service (CMRS) Providers (a) for Violating State Consumer Protection Laws Prohibiting False Advertising and Other Fraudulent Business Practices, and/or (b) in the Context of Contractual Disputes and Tort Actions Adjudicated Under State Contract and Tort Laws, WT Docket No. 99-263, Memorandum Opinion and Order, 15 FCC Rcd 17021 (2000) (section 332 does not generally preempt the award of monetary damages by state courts based on state tort or contract claims); Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, PR Docket No. 94-106, Report and Order, 10 FCC Rcd 7025, 7060-7061, ¶¶ 79-82 (1995) (concluding that states may regulate terms and conditions of CMRS offerings), aff'd sub nom. Connecticut Department of Public Utility Control v. FCC, 78 F.3d 842 (2d Cir. 1996).

<sup>&</sup>lt;sup>120</sup> Independents' Petition at 18 n. 48.

<sup>&</sup>lt;sup>121</sup> See Pittencrieff Communications, 13 FCC Rcd at 1748, ¶ 25; see also Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling, CC Docket No. 96-45, 15 FCC Rcd 15168 (2000) (discussing state commission limitations under section 253 on ETC designations).

<sup>&</sup>lt;sup>122</sup> 47 U.S.C. § 254(b).

 $<sup>^{123}</sup>$  See supra  $\P$  11.

<sup>124</sup> Independents' Petition at 18, n. 48.

- "(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State." The Kansas Commission has not filed such a petition, and there is no evidence that either of these market conditions exists in Kansas. Section 332(c)(3)(A) also permits state regulation that is necessary to ensure the "universal availability of telecommunications at affordable rates" if CMRS services are a "substitute for land line telephone exchange service for a substantial portion of the telecommunications in a state." The record does not reflect that CMRS represents a substitute for a substantial portion of the land line local exchange service in Kansas or that any particular regulations are necessary for universal service.
- 33. Finally, Independents also ask us to clarify the applicability of federal LEC regulation to BUS. As discussed above, the Commission has concluded that CMRS providers are not subject to LEC regulation regardless of whether they provide a substitute for local exchange service, and there is no record here to persuade us to depart from this conclusion in this instance. Thus, Western Wireless in its provision of BUS is not subject to sections 251(b) or (c), but is subject to section 251(a).

#### IV. CONCLUSION

34. Based on the record in this proceeding, we find that BUS is CMRS and we decline to classify Western Wireless as a LEC when it provides BUS. We conclude that this finding is consistent with the intent of Congress in adopting section 332(c)(3)(A) and other provisions of the Act providing for limited regulation of CMRS offerings in order to further service availability and competition in local exchange services. As discussed herein, BUS is regulated pursuant to federal law as a CMRS offering. Kansas is precluded and preempted from imposing rate and entry regulations on Western Wireless' BUS offering, but Kansas may regulate other terms and conditions, and Kansas may impose universal service regulations that are not inconsistent with section 332(c)(3)(A), other provisions of the Act, and the Commission's regulations.

<sup>&</sup>lt;sup>125</sup> 47 U.S.C. § 332(c)(3)(A). See also CMRS Second Report and Order, 9 FCC Rcd at 1505, ¶¶ 252-53; 47 C.F.R. § 20.13.

<sup>&</sup>lt;sup>126</sup> 47 U.S.C. § 332(c)(3)(A).

<sup>&</sup>lt;sup>127</sup> In its comments, Kansas states that Western Wireless' BUS offering "does not appear, at this time" to constitute a substantial portion of the communications within Kansas based on the information provided in Western Wireless' application, and requests that we clarify how a state would determine that commercial mobile services "are a substitute for a substantial portion of the communications within such State." Kansas Commission Comments at 4. As discussed in the *CMRS Second Report and Order*, this determination requires information regarding the range of basic telephone service alternatives available to consumers in the state. *CMRS Second Report and Order*, 9 FCC Rcd at 1505, ¶253.

<sup>&</sup>lt;sup>128</sup> The Commission may define CMRS providers that offer local exchange service as LECs under section 153(26), but it has not taken that action. 47 U.S.C. § 153(26). The Local Competition proceeding, in declining to regulate CMRS providers as LECs, clarified that whether CMRS providers are classified as LECs is within the sole discretion of the Commission. *Local Competition Order*, 11 FCC Rcd at 15499, ¶¶ 1004-1006.

 $<sup>^{129}</sup>$  See 47 U.S.C. § 251(a) (general duties imposed on all telecommunications carriers); see also supra  $\P$  7.

### V. ORDERING CLAUSE

35. IT IS THEREFORE ORDERED that pursuant to sections 1, 2, 4, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, and 405, and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, the Petition filed on November 3, 2000 by the State Independent Alliance and Independent Telecommunications Group regarding Western Wireless' BUS service is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch Secretary

#### APPENDIX

#### LIST OF COMMENTERS ON INDEPENDENTS' PETITION

### Comments

- 1. Beacon Telecommunications Advisors (Beacon)
- 2. Cellular Telecommunications & Internet Association (CTIA)
- 3. Dobson Cellular Systems, Inc. (Dobson)
- 4. Kansas Corporation Commission (Kansas Commission)
- 5. National Telephone Cooperative Association (NTCA)
- 6. Nebraska Rural Independent Companies (Nebraska Independents)
- 7. Minnesota Independent Coalition (Minnesota Independents)
- 8. Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO)
- 9. Rural Iowa Independent Telephone Association (Iowa Independents)
- 10. Rural Telecommunications Group (RTG)
- 11. Rural Utilities Service, Department of Agriculture (RUS)
- 12. South Dakota Independent Telephone Coalition (South Dakota Independents)
- 13. Sprint Corporation (Sprint)
- 14. John Staurulakis, Inc. (Staurulakis)
- 15. United States Telecom Association (USTA)
- 16. Warinner, Gesinger & Associates (Warinner)
- 17. Western Wireless Corporation (Western Wireless)
- 18. Fred Williamson & Associates, Inc. (Williamson)

#### Reply Comments

- 1. AT&T Wireless Services, Inc. (AT&T Wireless)
- 2. Cellular Telecommunications and Internet Association (CTIA)
- 3. Rural Telecommunications Group (RTG)
- 4. John Staurulakis, Inc. (Staurulakis)
- 5. State Independent Alliance and Independent Telecommunications Group (Independents)
- 6. Townes Telecommunications, Inc. (Townes)
- 7. United States Cellular Corporation (U.S. Cellular)
- 8. United States Telecom Association (USTA)
- 9. Warinner, Gesinger & Associates (Warinner)
- 10. Western Wireless Corporation (Western Wireless)
- 11. Fred Williamson & Associates, Inc. (Williamson)

# CONCURRING STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas Is Subject to Regulation as Local Exchange Service, WT Docket No. 00-239 (released August 2, 2002).

I concur with the result in this item because I agree with the majority that the service offering at issue should be regulated as a commercial mobile radio service (CMRS). Irrespective of whether the Telular terminal used by subscribers is a mobile or fixed station, I believe that the service is ancillary, auxiliary, or incidental to the traditional mobile cellular service provided by Western Wireless (Western).

Whether the Telular terminal qualifies as a mobile station presents a close call. There is no question that the equipment is "capable of being moved," but there is a serious question whether it "ordinarily does move." 47 U.S.C. § 153(28). As the order points out, the equipment is designed to operate while moving and there is evidence that a relatively small number of customers have roamed with it. I am nevertheless concerned that the weight of the evidence may suggest that the equipment "ordinarily" does not move. While it is possible to interpret the word "ordinarily" to mean "not aberrationally," it appears that a more natural interpretation would focus on the intended or typical use of the equipment. Given that the equipment is relatively large and heavy compared to most of today's mobile units, it operates on AC power and has only limited backup battery life, and it is designed to be used in conjunction with a traditional wireline telephone (that is, it has no integrated earpiece, speaker, or mouthpiece), it seems that consumers will not ordinarily use the Telular terminal in a mobile fashion.

I do not believe it was necessary for the Commission to resolve this difficult question, because the BUS offering is ancillary, auxiliary, or incidental to Western's primary cellular service. BUS is provided over precisely the same infrastructure and equipment as the conventional cellular service; it differs only with respect to the customer premises equipment. A relatively small number of customers — 386, at the time of Western's filing — subscribes to the service, in contrast with 45,000 traditional cellular customers in Kansas. The Commission's rules make clear that CMRS carriers may offer services incidental to their primary services so long as the provision of the incidental service (a) does not increase the costs borne by primary subscribers, (b) does not materially deteriorate the quality of the primary mobile service, and (c) is not inconsistent with the Act or our rules. 47 C.F.R. § 22.323. These factors support the conclusion that Western's BUS offering is incidental to its primary cellular offering. While our analysis could change in the future — for example, if Western deployed equipment dedicated to the BUS offering, or if the number of BUS subscribers increased substantially — the record before us indicates that the BUS service should be regulated as a mobile service.

### DISSENTING STATEMENT OF COMMISSIONER KEVIN J. MARTIN

Re: Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas Is Subject to Regulation as Local Exchange Service, Memorandum Opinion and Order, WT Docket No. 00-239.

I dissent from the majority's determination that Western Wireless's "Basic Universal Service" offering in Kansas is a "commercial mobile service" and is therefore not subject to regulations applicable to wireline local exchange carriers. As a matter of statutory interpretation, I do not agree that the Western Wireless terminals, which are larger and heavier than many VCRs and most lap top computers manufactured today, "ordinarily" move in the manner of typical mobile phones. I also find it difficult to believe this "Basic Universal Service" offering, which is designed specifically to qualify for universal service subsidies, should be deemed exempt from regulations and universal service fund requirements applicable to wireline local exchange carriers providing essentially the same service.

Under the Communications Act, a "commercial mobile service" is defined, in relevant part, as a service utilizing "a radio-communication station capable of being moved and which ordinarily does move." 47 U.S.C. § 153(28); see id. §§ 332(d)(1) and 153(27). Thus, as the majority acknowledges, the central questions in this matter are (1) whether a Western Wireless Basic Universal Service terminal is "capable of being moved" and (2) whether the terminal "ordinarily does move."

I disagree with the majority's conclusion that a Basic Universal Service terminal "ordinarily does move." This terminal, which is marketed as a substitute for a traditional wireline phone, is a "laptop-sized unit...powered by electricity...." Order  $\P$  9. The terminal is "2.76 inches x 12.9 inches x 11.8 inches and weighs 8.3 pounds." *Id.* (footnoted omitted). When operating on a battery, it is only capable of providing "one hour of talk time." *Id.* In other words, this terminal is about the size and weight of an older VCR or lap top computer and provides similar functionality to a typical wireline phone.

I believe that this device is too large, too heavy, and too lacking in mobile usefulness for a reasonable person to find that it "ordinarily" moves, as do other wireless devices. In fact, the Basic Universal Service terminal is larger and more cumbersome than any cell phone sold today, any PDA, or any pager, and provides essentially no additional functionality. In the past, mobile "bag" phones may have been this large or this heavy – as the Order points out – but in the past, this size may have been necessary for the functionality provided. The Basic Universal Service terminal is built and marketed at a time when the same functionality can be provided by a device that is less than half its size and less than half its weight. I find no functional reason that the device was made this large and heavy. Rather, the record suggests, the Basic Universal Service terminal was designed this way to emphasize that Basic Universal Service is like traditional wireline phone service, so that it could qualify for universal service subsidies. Whatever the merits of this design decision, the consequence is that – like a wireline phone – a Basic Universal Service terminal does not ordinarily move.

I also disagree with the majority's conclusion that, even if Basic Universal Service does not meet the statutory definition of a "commercial mobile service," it should still be considered as such because Basic Universal Service is "ancillary, auxiliary, or incidental" to traditional mobile cellular service provided by Western Wireless. See id. ¶ 26. The majority concludes that, based on Commission precedent, "a service provided by a cellular licensee can be treated as incidental for regulatory purposes even if the service is entirely fixed." Id. ¶ 28. The majority finds that Basic Universal Service is "incidental" here because it "is provided over the same spectrum and infrastructure as that Western Wireless uses to provide conventional mobile cellular service . . . ." Id. ¶ 27 (footnote omitted).

I find this reasoning troubling. While I might agree that certain "incidental" services provided over a mobile system should not change the "mobile" character of the system, I am uncomfortable with the majority's conclusion here. In short, I do not see how the statute's definition of "mobile" service can be read to encompass an entirely fixed service, merely because the fixed service uses the same network as a mobile service. I find this reasoning to be inconsistent with the statute. Accordingly, I respectfully dissent.

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C

Federal Communications Commission (F.C.C.)

Memorandum Opinion and Order

IN THE MATTER OF WESTERN WIRELESS CORPORATION PETITION FOR PREEMPTION OF STATUTES AND RULES REGARDING THE KANSAS STATE UNIVERSAL SERVICE FUND PURSUANT TO SECTION 253 OF THE COMMUNICATIONS ACT OF 1934

File No. CWD 98-90

FCC 00-309 Adopted: August 18, 2000 Released: August 28, 2000

\*16227 By the Commission: Commissioner Furchtgott-Roth concurring in part, dissenting in part, and issuing a statement.

#### I. INTRODUCTION

1. Kansas has enacted the Kansas Telecommunications Act (Kansas Act) and the Kansas Corporation Commission (KCC) has promulgated regulations to implement local exchange competition and promote universal service in the state. On July 20, 1998, Western Wireless Corporation (Western Wireless), a provider of commercial mobile radio service (CMRS) in Kansas, filed a Petition for Preemption asking the Commission to preempt those provisions of the Kansas Act and regulations that limited the ability of carriers other than incumbent local exchange carriers ("non-ILECs") to receive universal service support. Subsequent to Western Wireless' filing, the KCC adopted new regulations for determining and allocating universal service support that, among other things, make all such support fully portable among competing carriers in Kansas. With this Memorandum Opinion and Order, we therefore dismiss the Western Wireless petition as moot. However, in order to provide guidance on these critical universal service issues, which may well arise in other contexts, we briefly discuss certain concerns that similarly structured programs may easily run afoul of Section 253 of the Communications Act.

#### II. BACKGROUND

2. On May 17, 1996, Kansas enacted the Kansas Act to implement local exchange competition and promote universal service in that state. [FN1] Section 66-2005(c) of the Kansas Act requires all local exchange carriers in Kansas to reduce their intrastate access charges to interstate rate levels. The statute authorizes the KCC to offset the access charge and toll charge reductions required by the Kansas Act through rebalancing of local residential and business rates, with any remaining portion initially being paid out from the Kansas Universal Service Fund (KUSF or Fund). [FN2] Section 66-2008(a) of the Kansas Act states that "[t]he initial amount of the KUSF shall be comprised of local exchange carrier revenues \*16228 lost as a result of rate rebalancing" pursuant to section 66-2005(c) and that such revenues shall be recovered on a revenue-neutral basis. [FN3] Section 66-2008(d) requires the

KCC to periodically review whether changes in the cost of providing service justify modification of the KUSF, and, if so, modify the KUSF accordingly. [FN4] Section 66-2008(b) also requires all telecommunications providers, including wireless providers, to contribute to the KUSF on an equitable and nondiscriminatory basis. [FN5] Section 66-2008(c) states that distributions from the KUSF shall be made in a competitively neutral manner to qualified telecommunications public utilities, telecommunications carriers, and wireless telecommunications providers that are deemed eligible under section 214(e)(1) of the Communications Act by the KCC. [FN6] Section 66-2008(e) and (f) allow "[a]ny qualified telecommunications carrier, telecommunications public utility or wireless telecommunications service provider" to request supplemental funding from the KUSF. [FN7]

- 3. On December 27, 1996, the KCC issued an Order which, among other things, implemented the Kansas Act and established the KUSF. [FN8] Pursuant to section 66-2008(a), the KCC initially sized the KUSF at \$111.6 million, the amount of revenues it found that the ILECs lost as a result of intrastate access rate reductions mandated by the Kansas Act. [FN9] As explained by the KCC in its comments in this proceeding, the KUSF, at least initially, was comprised of two components -- a High Cost Funding program and a Rate Cut Funding program. Under the High Cost Funding program, all ETCs were eligible to receive support up to \$36.88 for each residential or single business line they serve in rural areas, defined by the KCC as exchange areas with 10,000 or fewer access lines. [FN10] In addition, in \*16229 order to implement the revenue neutrality requirement of the Kansas Act, [FN11] the Rate Cut Funding program provided ILECs additional support based on their revenues lost due to intrastate access charge reform. This support was based on the ILECs' statewide lines, and was thus not limited to "high cost" areas but was available to the ILECs -- and only the ILECs -- for lines they serve anywhere in the state. [FN12] The KCC also stated that a portion of the revenue-neutral support for ILECs would be designated as the amount per residential loop or "high cost" support. [FN13] Thus, the high cost support payment, according to the KCC, was "not in addition to the Rate Cut Funding." [FN14] In the first two years of the Fund, the KUSF distributed approximately \$158 million, of which approximately \$152 million, or 96 percent, was distributed to ILECs to offset the revenues they lost due to intrastate access charge reform. [FN15]
- 4. On July 20, 1998, Western Wireless filed a Petition for Preemption asking the Commission to declare that section 253 of the Communications Act of 1934, as amended, [FN16] preempted the provisions of the Kansas Act and the accompanying rules adopted by the KCC that served to limit the ability of carriers other than ILECs to receive universal service support under the Rate Cut Funding program in exchange areas with more than 10,000 access lines. [FN17] Western Wireless alleged that the Kansas Act and 1996 KCC Order violated sections 253(a) and 254(f) of the Communications Act because the KUSF's Rate Cut Funding program discriminated against new entrants and deterred competitive entry. [FN18] Western Wireless further alleged that the Kansas Act and 1996 KCC Order were not protected by section 253(b) because the Rate Cut Funding program was not competitively neutral and not related to the cost of providing universal service. [FN19] Fifteen parties filed comments on the Western Wireless petition and 11 parties filed reply comments. [FN20]
- \*16230 5. In late 1999 and early 2000, the KCC adopted a series of orders that substantially changed the operation of the KUSF. First, on September 30, 1999, the KCC adopted a forward-looking cost model for purposes of determining KUSF support for non-rural carriers (SWBT and Sprint). [FN21] This new mechanism replaces the

previous mechanism with respect to these carriers, eliminating the "transitional" Rate Cut Funding program intended to offset reductions in intrastate access charges. Then, on December 29, 1999, the KCC affirmed its forward-looking cost model with some modifications, applied the model to SWBT and Sprint, and made several other decisions relating to the KUSF. Most relevant for purposes of the Western Wireless petition, the KCC held that on a going-forward basis, all KUSF funding would be fully portable to competing carriers; i.e., if a competing carrier obtained a customer that was previously served by an ILEC, all funding that would previously have gone to the ILEC as a result of serving that line would instead be paid to the competing carrier. This principle of portability applies not only to the funding calculated for SWBT and Sprint under the new cost model, but also to the funding for rural ILECs that continues to be calculated under the High Cost Funding program and the previously non-portable Rate Cut Funding program. [FN22] Finally, on January 19, 2000, the KCC released an Order which, among other things, established a carrier assessment rate for SWBT that provides for universal service support at a level somewhat higher than would be calculated under the forward-looking cost model, but that preserves the principle of portability for all funding. [FN23] A similar settlement proceeding with Sprint remains pending. [FN24]

#### III. DISCUSSION

- 6. We conclude that Western Wireless' petition has been rendered moot by the December 1999 KCC Order. The gravamen of Western Wireless' complaint is that the Rate Cut Funding program, as previously structured, effectively prohibited the ability of non-ILECs to provide a telecommunications \*16231 service by rendering them ineligible for the substantial support that was available only to ILECs in exchanges with more than 10,000 access lines. [FN25] The December 1999 KCC Order rectified this feature of the KUSF by making all funding, including Rate Cut Funding, fully portable. We therefore dismiss the Western Wireless Petition as moot.
- 7. In order to provide guidance on these critical universal service issues which may well arise in other contexts, however, we briefly discuss our concern that programs structured like the original Rate Cut Funding program could easily run afoul of section 253. [FN26] Section 253 provides the legal framework for preemption of a state statute or regulation that prohibits or has the effect of prohibiting the competitive provision of telecommunications service, which we have applied on a number of occasions. [FN27] In order to determine whether a section 253(a) violation has occurred, we must consider whether the challenged law, regulation or legal requirement "prohibit[s] or has the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." [FN28]
- 8. We would be concerned about a universal service fund mechanism that provides funding only to ILECs. [FN29] A new entrant faces a substantial barrier to entry if its main competitor is receiving substantial support from the state government that is not available to the new entrant. A mechanism that makes only ILECs eligible for explicit support would effectively lower the price of ILEC-provided service relative to competitor-provided service by an amount equivalent to the amount of the support provided to ILECs that was not available to their competitors. Thus, non-ILECs would be left with two choices -- match the ILEC's price charged to the customer, even if it means serving the customer at a loss, or offer the service to the customer at a less attractive price based on the unsubsidized cost of providing such service.

[FN30] A mechanism that provides support to FLECs while denying funds to eligible prospective competitors thus may give customers a strong incentive to choose service from FLECs rather than competitors. Further, we believe that it is unreasonable to expect an unsupported carrier to enter a high cost market and provide a service that its competitor already provides at a substantially supported price. In fact, such a carrier may be unable to secure financing or finalize business plans due to uncentainty surrounding its state government imposed competitive disadvantage. Consequently, such a program may well have the effect of prohibiting such competitors from providing telecommunications service, in violation of section 253(a).

9 If we find that a state requirement violates section 253(a), then we must determine whether it \*16232 is nevertheless permissible under section 253(b)! FENSI! The criteria set forth immediate 253(b)! preserve the states ability "To impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service. "FNE2! We have held that a state program must meet all thirese of prese criteria. It must be "competitively neutral," "consistent with section 254." and 'necessary to preserve and advance this versal service. — to fall within the "safe harbor" of section 253(b): [EN33] we have preempted state regulations for fall treats section 253(a) and does not fall within the safe harbor of section 253(b); the Commission must preempt the enforcement of the regularement, in accordance with section 253(d): [EN35]

10. It appears doubtful that a program which limits eligibility for universal service funding to TLECs would be found competitively neutral, and thus within the authority reserved to the states in section 253(b): "[S]ection 253(b) cannot save a state legal requirement from preemption pursuant to sections 253(a) and (d) unless) inter alia, the requirement is competitively neutral with respect to, and as between all of the participants and potential participants in the market at issue "[ENB6] Because as discussed above, a mechanism that offers non portable support may give ELECs a substantial unfair price advantage in competing for customers. It is difficult to see how such a program could be considered competitively neutral Moreover, a state requirement which otherwise violates section 253(b) cannot be saved merely because it is transitional [EN37]

The Weighter note that approgram that provides universal service funding only to MECS could well be found invalled under traditional preemption doctrine. A state or local provision may be preempted when for instance it conflicts with federal law or usual services as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress II PNSB Preemption may result not only from \*16233 action taken by congress, but also from a federal agency acting within the scope of its congressionally delegated authority. [FNS9] we have previously held in interpreting section 254 of the Communications act [FNS9] which is competitive neutrality in the confiscion and destribution of eliquibility in the confiscion and destribution of eliquibility in the confiscion and destribution of eliquibility in the confiscion and also important small consistent with congressional intent and necessary to promote a procompetitive desceptiatory national policy manework [FNA1] as atsensed above Fig. Its doubtful that a numiversal service supports we have program under the following program that restricts elliquibility to TNECs sould be considered competitively recurring Thus, asprogram of this nature may well be found to be engone seems with and to impede the achievement of important congressional and commissional sould be considered.

2000 WL 1209411 (F.C.C.), 15 F.C.C.R. 16,227, 15 FCC Rcd. 16,227 (Cite as: 15 F.C.C.R. 16227)

12. We decline to address in this order the other challenges to provisions of the KUSF that the parties raised. [FN42] These issues were not raised by Western Wireless in its petition and are beyond the scope of this proceeding. [FN43]

#### IV. CONCLUSION

13. In conclusion, we find that the orders adopted and implemented by the KCC in late 1999 and early 2000 have effectively rendered moot the significant issues of lawfulness raised by Western Wireless regarding the operation of the previously structured program. We therefore dismiss Western Wireless' petition as moot.

#### V. ORDERING CLAUSE

- 14. Accordingly, IT IS ORDERED that, pursuant to section 4(i) of the Communications Act of \*16234 1934, as amended, 47 U.S.C. § 154(i), and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that this Memorandum Opinion and Order IS ADOPTED.
- 15. IT IS FURTHER ORDERED that the Petition for Preemption filed by Western Wireless Corporation IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Secretary

FN1. K.S.A. 1996 Supp. 66-2001 et seq. The Kansas Act went into effect on July 1, 1996.

FN2. K.S.A. 1996 Supp. 66-2005(c).

FN3. K.S.A. 1996 Supp. 66-2008(a).

FN4. K.S.A. 1996 Supp. 66-2008(d).

FN5. K.S.A. 1996 Supp. 66-2008 (b). Wireless carriers, however, do not have to make contributions from the intrastate revenue derived from calls that originate and terminate entirely over a wireless network. K.S.A. 1996 Supp. 66-2008 (b); see also Order No. 5, "Establishing Carrier Assessment Rate for Year 2000 KUSF Contributions," KCC Docket No. 00-GIMT-236-GIT at 10, ¶ ¶ 18-19 (January 19, 2000) (January 2000 KCC Order).

FN6. K.S.A. 1996 Supp. 66-2008(c). Under section 214(e)(1), 47 U.S.C. § 214(e)(1), carriers that are designated as eligible telecommunications carriers (ETCs) under section 214(e) shall be eligible to receive universal service support.

FN7. Section 66-2008(e) provides for supplemental funding based on an increase in a carrier's access lines. K.S.A. 1996 Supp. 66-2008(e). Section 66-2008(f) provides that the KCC may, at its discretion, provide supplemental funding for other reasons. K.S.A. 1996 Supp. 66-2008(f).

FN8. General Investigation Into Competition Within the Telecommunications Industry in the State of Kansas, Docket No. 190,492-U, 94-GIMT-478-GIT, Order (KCC, rel. Dec. 27, 1996) (1996 KCC Order), aff'd in pertinent part on recon. (KCC, rel. Feb. 3, 1997) (1997 KCC Reconsideration Order). Several parties, including wireless carriers, appealed these orders in the Kansas state court system. Although the Kansas Court of Appeals reversed the orders, the Kansas Supreme Court affirmed these orders in their entirety. See <a href="Citizens">Citizens</a> Util. Ratepayer Bd v. State Corp. Comm'n, 943 P.2d 494 (Kan. Ct. App. 1997); Citizens' Util. Ratepayer Bd v. State Corp. Comm'n, 956 P.2d 685, 700 (Kan. 1998).

FN9. KCC Order, ¶ ¶ 106, 112. The size of the KUSF has subsequently been adjusted and was estimated to be \$96.3 million for the March 1999 to February 2000 period. See Letter from James H. Lister, counsel for KCC, to David H. Krech, FCC, dated May 4, 1999 at 2; Letter from James H. Lister, counsel for KCC, to David H. Krech, FCC, dated May 11, 1999.

FN10. 1996 KCC Order,  $\P$  ¶ 123-125. The KCC used rural areas as a proxy for high cost areas.

FN11. See K.S.A. 1996 Supp. 66-2008(c). The KCC interpreted this provision to require that funds should be distributed so that the ILECs would not initially lose revenue as a result of access charge reform. 1996 KCC Order, ¶ 124.

FN12. KCC Comments at 3.

FN13. 1996 KCC Order, ¶ 124.

FN14. KCC Comments at 4.

FN15. See Performance Audit Report: Reviewing Payments from the Kansas Universal Service Fund, Legislative Division of Post Audit, State of Kansas, August 1999, at 6, 7, 17-20. See also Letter from James H. Lister, counsel for KCC, to David H. Krech, FCC, dated May 4, 1999 at 2; Letter from James H. Lister, counsel for KCC, to David H. Krech, FCC, dated May 11, 1999 (projecting that for the March 1999 to February 2000 period, 84 percent of KUSF funding would go exclusively to ILECs under

2000 WL 1209411 (F.C.C.), 15 F.C.C.R. 16,227, 15 FCC Rcd. 16,227 (Cite as: 15 F.C.C.R. 16227)

the Rate Cut Funding program).

FN16. 47 U.S.C. § 253.

FN17. Petition for Preemption, Pursuant to <u>Section 253</u> of the Communications Act, of Kansas Statutes and Rules that Discriminate Against New Entrants, filed by Western Wireless Corporation July 20, 1998 (Western Wireless Petition).

FN18. Western Wireless Petition at 1 (citing 47 U.S.C. § § 253(a), 254(f)).

FN19. Western Wireless Petition at 1 (citing 47 U.S.C. § 253(b)).

FN20. The following parties filed comments in response to the Public Notice: Aerial Communications, Inc. (Aerial); AT&T Corp. and AT&T Wireless Services, Inc. (AT&T); Bell Atlantic Mobile, Inc. (BAM); Cellular Telecommunications Industry Association (CTIA); Independent Telecommunications Group (ITG); Kansas Corporation Commission (KCC); Liberty Cellular, Inc. (Liberty); MCI Telecommunications Corp. (MCI); Nextel Communications, Inc. (Nextel); Omnipoint Communications, Inc. (Omnipoint); Personal Communications Industry Association (PCIA); Southwestern Bell Telephone company (SWBT); Sprint Corporation (Sprint); Sprint Spectrum L.P.; State Independent Alliance (SIA); and United States Cellular Corp. (USCC). The following parties filed reply comments: Aerial; AirTouch Communications, Inc. (AirTouch); KCC; MCI WorldCom, Inc. (MCI WorldCom); Nextel; Omnipoint; SWBT; Sprint Spectrum; SIA; United States Telephone Association (USTA); and Western Wireless. In addition, the Local and State Government Advisory Committee (LSGAC) of the Commission recommended at its March 4, 1999 meeting that the Commission not preempt the provisions of the Kansas Act and 1996 KCC Order challenged by Western Wireless. FCC Local and State Government Advisory Committee, Advisory Recommendation Number 14, Petition of Western Wireless Corp., File No. CWD 98-90, adopted March 12, 1999. Cf. Letter from Michele C. Farquhar, counsel for Western Wireless, to Magalie Roman Salas, FCC, dated April 8, 1999 (responding to the LSGAC recommendation); Letter from Ken Fellman, LSGAC Chairman, to FCC Commissioners, dated May 11, 1999 (reaffirming LSGAC's recommendation).

FN21. Order 10: "Establishing Assessment Rates for Year 2000 KUSF Contributions" KCC Docket No. 99-GIMT-326-GIT (September 30, 1999). The KCC based its new model on the Commission's forward-looking Proxy Cost Model, making some modifications to account for conditions specific to telecommunications providers in Kansas. See December 1999 KCC Order at 17,  $\P$  26.

FN22. December 1999 KCC Order at 84, ¶ ¶ J, K.

FN23. Order 5: "Establishing Carrier Assessment Rate for Year 2000 KUSF Contributions" KCC Docket No. 00-GIMT-236-GIT (January 19, 2000).

2000 WL 1209411 (F.C.C.), 15 F.C.C.R. 16,227, 15 FCC Rcd. 16,227 (Cite as: 15 F.C.C.R. 16227)

FN24. See Kansas Docket No. 00-UTDT-455-GIT.

FN25. See Western Wireless Petition at 10-11.

FN26. 47 U.S.C. § 253.

FN27. See, e.g., Classic Telephone, Inc., 11 FCC Rcd 13082 (1996); New England
Public Communications Council, 11 FCC Rcd 19713 (1996), recon. denied, 12 FCC Rcd
5215 (1997); Pittencrieff Communications, Inc., 13 FCC Rcd 1735 (1997), aff'd sub
nom CTIA v. FCC, 168 F.3d 1332 (D.C. Cir. 1999) (Pittencrieff); Silver Star
Telephone Company, 12 FCC Rcd 15639 (1997) (Silver Star), recon. denied, 13 FCC Rcd
16356 (1998), aff'd sub nom. RT Communications, Inc. v. FCC, 201 F.3d 1264 (10th
Cir. 2000); Public Utility Commission of Texas, CCB Pol 96-13 et al., FCC 97-346, 9
CR (P&F) 958 (released Oct. 1, 1997) (Texas PUC); California Payphone Association,
12 FCC Rcd 14191 (1997).

FN28. 47 U.S.C. § 253(a).

FN29. See Pittencrieff, 13 FCC Rcd at 1751, ¶ 31.

FN30. See Western Wireless reply comments at 11.

FN31. 47 U.S.C. § 253(b). See, e.g., Silver Star, 13 FCC Rcd at 15655-56, ¶ 37; Texas PUC at ¶ 42. Section 253(c) sets forth additional situations, which are not present here, in which a state or local government requirement that violates section 253(a) may still be acceptable. 47 C.F.R. § 253(c).

FN32. 47 U.S.C. § 253(b). Section 253(b) also preserves the states' ability to impose competitively neutral requirements that are necessary to protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. Id. These provisions are not at issue here.

FN33. Pittencrieff, 13 FCC Rcd at 1752, ¶ 33; accord Silver Star, 12 FCC Rcd at 15655-57, ¶ ¶ 37, 40.

FN34. For example, in Silver Star, we preempted a Wyoming statute for its failure to satisfy the "competitive neutrality" criterion. 12 FCC Rcd at 15658-60,  $\P$  42, 45.

FN35. 47 U.S.C. § 253(d). ("If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.").

FN36. Silver Star Reconsideration, 13 FCC Rcd at 16361, ¶ 11 (emphasis in original).

FN37. See Silver Star, 12 FCC Rcd at 15657, ¶ 39. We also would be concerned that non-portable support available only to ILECs may not be consistent with section 254 and necessary to preserve and advance universal service. Given the current posture of the case, however, we will not discuss these issues.

FN38. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984), citing Hines v. Davidowitz, 312 U.S. 57, 67 (1941); State Corporation Commission of Kansas v. FCC, 787 F.2d 1421, 1425 (10th Cir. 1986). See also Louisiana Public Service Commission v. FCC, 476 U.S. 355, 368-69 (1986) (Louisiana PSC).

FN39. Louisiana PSC, 476 U.S. at 368-69, citing Fidelity Federal Savings and Loan Assn. v. De la Cuesta, 458 U.S. 141 (1982); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691.

FN40. 47 U.S.C. § 254.

FN41. Federal-State Joint Board on Universal Service, Report and Order, CC <u>Docket</u> No. 96-45, 12 FCC Rcd 8776, 8801-02, ¶ 48 (1997), corrected by Federal-State Joint Board on Universal Service, Erratum, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), aff'd in part, rev'd in part, remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC, 183 F. 3d 393 (5th Cir. 1999). To the extent that a state's universal service program, that is structured like the KUSF, involves matters properly within the state's intrastate jurisdiction under section 2(b) of the Act, those matters, if inseverable from the federal interest in promoting universal service in <u>section 254</u>, remain subject to federal preemption. See Louisiana PSC; AT&T v. Iowa Utilities Board, 119 S.Ct. 721, 730 (1999); Texas Office of Public Utility Counsel v. FCC, 183 F.3d at 423.

FN42. See Bell Atlantic Mobile comments at 4-5 (arguing that the Kansas Act provision limiting the amount of a carrier's KUSF contribution that it may collect from its customers to 8.89% of the carrier's intrastate retail revenues violates section 332(c)(3) as applied to CMRS providers); CTIA comments at 8-9 (similar); AT&T comments at 1, 3-4 (arguing that KUSF conflicts with section 214(e) of the Communications Act); CTIA comments at 5-6 (similar).

FN43. We do note, however, that the limitation on passing through contributions to a carrier's retail customers expired on January 1, 2000. K.S.A. 1996 Supp. 66-2008(b). We further note that we have recently addressed in another proceeding issues concerning the application of <a href="section 214(e)">section 214(e)</a>. Federal State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Report and Order, CC Docket No. 96-45, <a href="FCC 00-208">FCC 00-208</a> (released June 30, 2000).

\*16235 STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH, CONCURRING IN PART AND DISSENTING IN PART

Re: Western Wireless Corporation Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to <u>Section 253</u> of the Communications Act of 1934, File No. CWD 98-90.

As the Commission correctly recognizes, Western Wireless's petition is moot. The Kansas Corporation Commission has completely altered its regulatory scheme for determining and allocating universal service support to carriers in Kansas. Western Wireless's petition must therefore be dismissed as moot, and I concur in this aspect of the order.

Why the Commission thinks it necessary to devote an additional five or six pages of this order to a discussion of why it would preempt the Kansas regulations if they were still in effect is beyond me. The Commission vaguely asserts its advisory opinion is necessary "to provide guidance" on universal service issues, based on its wholly unsupported assertion that these issues ""might well arise elsewhere." Tellingly, the Commission cannot point to a single state commission that has even suggested it would adopt requirements similar to the Kansas Commission's.

I therefore dissent from those aspects of this order that purport to interpret section 253(d). Although this agency - unlike Article III federal courts - may have the power to render advisory opinions in some circumstances, I think it exceedingly unwise for it to make such determinations in connection with section 253(d). In my view, in making this statement, the Commission disregards basic principles of federal-state comity and insults the Kansas Commission, which has itself corrected whatever infirmity may have existed in its previous rules.

The 1996 Act contemplates that state commissions will play an important part in bringing competition to the local exchange markets, and it gives states freedom to fashion regulatory approaches that supplement the Act's federal requirements. See, e.g., 47 U.S.C. § 253(b). This Commission may interfere with a state commission's requirements only pursuant to <a href="section 253(d)">section 253(d)</a>. An examination of that provision is instructive. It states that if the Commission ""determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates [section 253(a) or (b)], the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency." 47 U.S.C. § 253(d) (emphasis added). The provision is drafted in the present tense, and I therefore question whether we may legally make <a href="section 253(d)">section 253(d)</a> determinations on state commission rulings that do not exist. Moreover, given that no regulation currently exists, a Commission ruling is most assuredly not "necessary to correct" the Kansas Commission's approach to implementing the Act's universal service provisions.

In any event, I believe that comity concerns alone are enough to prevent us from reaching out to strike down nonexistent state regulations, simply in order to dictate to \*16236 states the "proper" way for them to conduct their business. We must not forget that Congress charged both this Commission and the state commissions

2000 WL 1209411 (F.C.C.), 15 F.C.C.R. 16,227, 15 FCC Rcd. 16,227 (Cite as: 15 F.C.C.R. 16227)

with implementing the 1996 Act, and we should keep our interference in the business of the states to a minimum.

2000 WL 1209411 (F.C.C.), 15 F.C.C.R. 16,227, 15 FCC Rcd. 16,227

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## STATE OF ALASKA

### THE REGULATORY COMMISSION OF ALASKA

Before Commissioners:

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Mark K. Johnson, Chair Kate Giard Dave Harbour James S. Strandberg G. Nanette Thompson

In the Matter of the Request by ALASKA DIGITEL, LLC for Designation as a Carrier Eligible to Receive Federal Universal Service Support Under the Telecommunications Act of 1996

U-02-39

ORDER NO. 10

### ORDER GRANTING ELIGIBLE TELECOMMUNICATIONS CARRIER STATUS AND REQUIRING FILINGS

BY THE COMMISSION:

### Summary

We grant Alaska DigiTel, LLC (ADT)'s application for status as an eligible telecommunications carrier (ETC) for purposes of receiving federal and state universal service funding. We require ADT to file an affidavit certifying that it will advertise its services. We require ADT to file and maintain information concerning its Lifeline and Link Up services. We require ADT to annually file information with this commission describing its use of universal service funds (USF).

### Background

eligible ln docket, ADT requests designation this an telecommunications carrier. The Telecommunications Act of 1996 (the Act)<sup>1</sup> requires us

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<sup>&</sup>lt;sup>1</sup>Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) amending the Communications Act of 1934, 47 U.S.C. §§ 151 et seg.

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to evaluate ETC requests from telecommunications carriers<sup>2</sup> by applying the standards in federal law.3 ETCs must provide basic universal telecommunications service throughout a defined service area. ETCs are eligible to receive a per customer subsidy to provide, maintain, and upgrade facilities and services for basic telecommunications service.4

ADT has requested the designation throughout the MTA service area. ADT asserted it will provide universal services and will use the USF funds it receives to invest in new cell towers within the Matanuska Telephone Association (MTA) service The Rural Coalition (RC)<sup>5</sup> and the certificated utility, MTA, have actively participated in this docket. We granted intervention to the RC, MTA, ACS Rural LECs, 6 and GCI.7

During the notice period, we received comments from four of ADT's customers, who all supported ADT's request for ETC status.

<sup>&</sup>lt;sup>2</sup>47 U.S.C. § 153(44), 47 C.F.R. § 54.201.

<sup>&</sup>lt;sup>3</sup>47 U.S.C. § 214(e).

<sup>&</sup>lt;sup>4</sup>47 U.S.C. § 254(e).

<sup>&</sup>lt;sup>5</sup>For purposes of this proceeding, the Rural Coalition's member companies include Arctic Slope Telephone Association Cooperative; Bristol Bay Telephone Cooperative, Inc.; Bush-Tell, Inc.; Copper Valley Telephone Cooperative, Inc.; Cordova Telephone Cooperative; Interior Telephone Company, Inc.; Ketchikan Public Utilities -Telephone Division; Mukluk Telephone Company, Inc.; Nushagak Telephone Cooperative, Inc.: OTZ Telephone Cooperative, Inc.; United-KUC, Inc.; and United Utilities, Inc.

<sup>&</sup>lt;sup>6</sup>The ACS Rural Local Exchange Companies (ACS Rural LECs) are: ACS of Fairbanks, Inc. d/b/a Alaska Communications Systems, ACS Local Service, and ACS; ACS of Alaska, Inc. d/b/a Alaska Communications Systems, ACS Local Service. and ACS; and ACS of the Northland, Inc. d/b/a Alaska Communications Systems, ACS Local Service, and ACS.

<sup>&</sup>lt;sup>7</sup>GCI Communication Corp. d/b/a General Communication, Inc. d/b/a GCI (GCI)

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In Order U-02-39(5), dated February 10, 2003, we decided we would determine capability and commitment on the basis of filings received to date from the parties, and responses to additional questions posed in Order U-02-39(5). We also determined we would have a hearing to address whether the ADT ETC designation is in the public interest.8

### Discussion

State commissions must decide whether or not applications for ETC status Federal law requires us to apply the following criteria to our should be granted.9 evaluation of ADT's request for ETC status:10

<sup>&</sup>lt;sup>8</sup>We reserved the right to end the investigation before the public interest hearing if we found ADT incapable or not committed.

<sup>&</sup>lt;sup>9</sup>See n. 1.

<sup>&</sup>lt;sup>10</sup>These criteria are derived from Section 214(e)(1) and (2) of the Act which provides:

<sup>(1)</sup> A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received -

<sup>(</sup>A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

<sup>(</sup>B) advertise the availability of such services and the charges therefor using media of general distribution.

<sup>(2)...</sup>Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

_	Has ADT	demonstrated	that it owne a	t laget como	facilities
•	Has AUT	uemonstrated	-mai ii owns a	r ieasi some	: racumes 4

- Has ADT demonstrated it will appropriately advertise its services?
- Has ADT demonstrated a capability and commitment to provide the Nine Basic Services required by Federal Communications Commission (FCC) regulation?<sup>11</sup>
- Is granting ADT's application in the public interest?

State commissions may impose conditions on the granting of ETC applications to assure that the public interest is met. 12

### Ownership of Facilities

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We found in Order U-02-39(5) that ADT meets the facility ownership criteria for ETC status. In that Order, we also concluded that it is reasonable for ADT to use the MTA study area as its universal service area.

### Advertising Services

Section 214(e)(1)(B) of the Act requires an ETC to advertise the availability of the Nine Basic Services (including Link Up and Lifeline)<sup>13</sup> and the charge for the services using "media of general distribution."

When we granted MTA ETC status, we required MTA to meet the following minimum criteria to ensure appropriate and sufficient customer notification of its services:14

- a) once every two years MTA must perform community outreach through appropriate community agencies by notifying those agencies of MTA's available services:
- b) once every two years MTA must post a list of its services on a school or community center bulletin board in each of the utility's exchanges;

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<sup>&</sup>lt;sup>11</sup>The Nine Basic Services are defined at 47 C.F.R. § 54.101.

<sup>&</sup>lt;sup>12</sup>Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999).

<sup>&</sup>lt;sup>13</sup>Link Up is described at 47 C.F.R. § 54.411, and Lifeline at 47 C.F.R. § 54.405.

<sup>&</sup>lt;sup>14</sup>In the following paragraphs addressing minimum advertising requirements, "services" referred to those services for which MTA receives universal service support. MTA was not required to advertise nonsupported services.

c) once services	MTA	must p	orovide	a bill	stuffer	indicating	its	available
-1)	 			.: :4.			<b>L</b> -	

d) once a year MTA must advertise its services through a general distribution newspaper at the locations it serves. 15

We believe these standards are also appropriate for ADT. ADT has agreed to comply with our interpretation of what advertising was required by Section 214.

### Capability and Commitment

We established in Order U-02-39(5) that we would concentrate on ADT's provision of the nine basic services required by the FCC.<sup>16</sup> Our ruling was based on the FCC's guidelines.<sup>17</sup> The parties cited many cases, none of which persuaded us to modify our decision.

<sup>&</sup>lt;sup>15</sup>Order U-97-187(1), dated December 19, 1997, at 16.

<sup>&</sup>lt;sup>16</sup>Order U-02-39(5) at 6.

<sup>&</sup>lt;sup>17</sup>We held in Order U-02-39(5) that we would follow the FCC guideline that ADT "must make a reasonable demonstration of its capability and commitment to provide the services required of an ETC throughout the service area for which it seeks ETC status. ADT does not need to provide detailed specifications of all aspects of its technical and financial abilities. ADT must, however, provide enough information to credibly demonstrate its ability." Order U-02-39(5) at 4. *In Re Federal-State Joint Bd. on Universal Service; Western Wireless Petition For Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket No. 96-45, Declaratory Ruling, 15 FCC Rcd. 15168, para. 24 (2000) (*South Dakota Order*).

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ADT need not provide detailed specifications of all aspects of its technical and financial abilities. However, ADT must provide enough information to demonstrate its ability to provide <u>each</u> of following Nine Basic Services designated by the FCC<sup>18</sup> or obtain a waiver:<sup>19</sup>

- Voice grade access to the public switched network (including Lifeline and Link Up services),
  - 2) Local usage,
  - 3) Dual tone multi-frequency signaling or its functional equivalent,
  - 4) Single-party service or its functional equivalent,
  - 5) Access to emergency services,
  - 6) Access to operator services,
  - 7) Access to interexchange services,
  - 8) Access to directory services, and
  - 9) Toll limitation for qualifying low-income consumers.

ADT is a wireless personal communications service licensee that currently provides service in the MTA service area, Juneau, Fairbanks, and Kenai through more than 50 cell sites. ADT operates 15 cell sites within the proposed ETC service area. ADT has a staff of 60, which includes experienced engineers and technical support personnel. ADT began providing service in Alaska in November 1998.

<sup>&</sup>lt;sup>18</sup>See n. 11.

<sup>&</sup>lt;sup>19</sup>The FCC allows a state commission to grant waiver of the requirement to provide single-party, access to enhanced 911, and toll limitation services to allow additional time for a carrier to complete network upgrades necessary to provide service. 47 C.F.R. § 54.101(c).

<sup>&</sup>lt;sup>20</sup>Alaska DigiTel, LLC's Response to Order Requiring Filing and Addressing Eligible Telecommunications Carrier Criteria (ADT's Response), filed March 10, 2003, at 2.

ADT's years of experience deploying wireless service reasonably demonstrates its technical knowledge and basic abilities to provide wireless telecommunications service. The parties do not dispute ADT's technical competence. Instead, their arguments have centered on whether ADT has the financial ability and intent to build out its facilities throughout the MTA service area.

The RC asserts ADT has not shown a study area-wide capability and commitment and thus is prepared only to serve a small portion of the MTA study area for the foreseeable future.<sup>21</sup> The RC also asserts that ADT proposes a meager network build-out in the next two years. The RC provides financial information showing that even with universal service funding, ADT lacks resources to complete its proposed expansion.<sup>22</sup> The RC argued that ADT did not provide enough credible evidence to demonstrate its capability and commitment. The RC also stated that ADT provided no verifiable data for service quality.

MTA asserts that ADT has not shown that it would ever be able to serve the entire MTA study area, and that this ability is a prerequisite to receipt of ETC status, unless the FCC and RCA mutually agree to a different definition of the company's service area.<sup>23</sup>

ADT admits that its current facilities do not cover the entire MTA service area, and that it could not build out to many areas where demand for service existed

<sup>&</sup>lt;sup>21</sup>Rural Coalition's Reply to Alaska DigiTel, LLC's Capability and Commitment Filing (RC's Reply), filed March 24, 2003, at 1-2.

<sup>&</sup>lt;sup>22</sup>Id. at 2.

<sup>&</sup>lt;sup>23</sup>Matanuska Telephone Association's Reply to Alaska DigiTel, LLC's Response to Order Requiring Filings and Addressing Eligible Telecommunications Carrier Criteria (MTA's Reply), filed March 24, 2003, at 8-9.

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without access to federal USF. ADT commits to begin construction of six new cell sites in the first 24 months after it obtains USF. During the first year after obtaining funding, ADT plans to construct facilities in Big Lake, Willow, and Talkeetna, Alaska. In its second year of funding, ADT plans to begin construction of facilities in Trapper Creek, Petersville, and Cantwell, Alaska. ADT estimates a construction cost of \$250,000 per cell site. ADT states that the total construction costs would likely exceed ADT's projected support for the first two years.

ADT may not be able to serve the entire MTA service area with its own facilities for several years. However, this does not preclude ETC status. ADT is not required to provide service using only its own facilities. Federal law specifies that an ETC may provide service through a combination of its own facilities and resale.<sup>24</sup> Therefore, ADT need not prove its ability to build facilities through every portion of MTA's service area. ADT must demonstrate that its method of providing servithroughout the MTA area is reasonable.

ADT proposes to provide service throughout the MTA service area using its own facilities or, if necessary, a combination of its own facilities and resale of another carrier's services. ADT describes a 7-step plan for serving customers:<sup>25</sup>

- a) if ADT can serve within its existing network, ADT will immediately serve the customer:
- b) if the customer is not in an area where ADT currently provides service, ADT will:

Step 1: determine whether the customer's equipment can be modified or replaced to provide acceptable service;

<sup>&</sup>lt;sup>24</sup>47 U.S.C. § 214(e)(1)(A).

<sup>&</sup>lt;sup>25</sup>ADT's Response at 9-10.

Step 2: determine whether a roof-mounted antenna or other network equipment can be deployed at the premises to provide service;

Step 3: determine whether adjustments at the nearest cell site can be made to provide service;

Step 4: determine whether a cell-extender or repeater can be employed to provide service;

Step 5: determine whether there are any other adjustments to network or customer facilities that can be made to provide service;

Step 6: explore the possibility of offering the resold services of carriers with facilities available to that location;

Step 7: determine whether an additional cell site can be constructed to provide service, and evaluate the costs and benefits of using scarce high-cost support to serve the number of customers requesting service.

ADT states that if there is no possibility of providing service short of constructing a new cell site, it will report to the commission, providing the proposed cost of construction and the company's position on whether the request for service is reasonable and whether high-cost funds should be expended on the request.<sup>26</sup>

We find ADT's plan is a reasonable means for ADT to provide service throughout the MTA service area upon reasonable customer request. We will address any ADT requests to deny service on a case-by-case basis.

<sup>&</sup>lt;sup>26</sup>Direct Testimony of Stephen M. Roberts on Behalf of Alaska DigiTel, LLC (Roberts Direct Testimony), filed March 17, 2003, at 14.

We do not find MTA's and the RC's arguments that ADT lacks the financial capability to live up to its universal service commitments persuasive. ADT's proposal demonstrates a reasonable commitment to serve and is adequate for our purposes in this docket.

The RC and MTA challenge the financial viability of ADT's plans to expand during the first two years.<sup>27</sup> We find that ADT's 7-step plan for providing service documents a reasonable strategy for providing service throughout the study area. We note that if ADT fails to serve throughout its designated service area, we would have cause to revoke its ETC status.

ADT is not required to provide service where there are no prospective customers. The FCC has determined an ETC must only provide service upon "reasonable request" and should be treated similarly to the incumbent on this point:

Gaps in Coverage. We find the requirement that a carrier provide service to every potential customer throughout the service area before receiving ETC designation has the effect of prohibiting the provision of service in high-cost areas. As an ETC, the incumbent LEC is required to make service available to all consumers upon request, but the incumbent LEC may not have facilities to every possible consumer. We believe the ETC requirements should be no different for carriers that are not incumbent LECs. A new entrant, once designated as an ETC, is required, as the incumbent is required, to extend its network to serve new customers upon reasonable request. We find, therefore, that new entrants must be allowed the same reasonable opportunity to provide service to requesting customers as the incumbent LEC, once designated as an ETC. (Emphasis added.) Thus, we find that a telecommunications carrier's inability to demonstrate that it can provide ubiquitous service at the time of its request for designation as an ETC should not preclude its designation as an ETC. (Footnotes omitted.)<sup>28</sup>

We agree with the FCC's conclusion. We find reasonable ADT's 7-step plan and its stated commitment to serve all reasonable requests.

<sup>&</sup>lt;sup>27</sup>RC's Reply at 10; MTA's Reply at 2.

<sup>&</sup>lt;sup>28</sup>South Dakota Order at para. 17.

### **Emergency Services**

The parties alleged that ADT failed to direct emergency calls to the correct emergency response center in Palmer and instead directed the calls to Anchorage. ADT agreed that the calls should not have been directed to Anchorage, and worked to resolve the matter. As of April 15, 2003, ADT was processing 911-calls to the Palmer Public Service Access Point (PSAP).<sup>29</sup> Therefore, by the date of hearing, the allegations about misdirected emergency calls were resolved.

The RC and MTA challenged ADT's ability to provide adequate emergency services, claiming that ADT only asserted an ability to provide undefined "M-911" service. ADT asserted that it complies with all federal phase-in requirements for emergency services that apply to wireless carriers; and no party provided contradictory evidence. We conclude that ADT has adequately demonstrated its ability to meet the emergency services requirement associated with ETC status.

### Lifeline and Link Up Services

ADT committed to provide Lifeline and Link Up services. However, when developing its proposed level of Lifeline and Link Up discounts and its proposed customer eligibility criteria, ADT may not have taken into account that all of Alaska is deemed tribal land and eligible for enhanced Lifeline and enhanced Link Up services under the FCC rules. We require ADT to revise its proposed level of Lifeline and Link Up services to recognize the higher level of support offered to tribal land areas, or explain why this should not occur. Within 30 days of the date of this Order, ADT is required to file the following information with us:

<sup>&</sup>lt;sup>29</sup>Prefiled Reply Testimony of Clay Dover on Behalf of Alaska DigiTel, LLC (Dover Reply Testimony), filed May 5, 2003, at 7.

<sup>&</sup>lt;sup>30</sup>RC's Reply at 13-14; MTA's Reply at 21-22. See Roberts Direct Testimony at 4.

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2	upon which the Lifeline and Link Up discounts will be applied;							
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4	b) the Lifeline and Link Up discounts that it will apply;							
5	c) the means test that it will use to determine whether a customer is							
6	qualified for Lifeline or Link Up services; and							
7	d) how ADT will ensure that Lifeline customers will not be disconnected for							
8	failure to pay their "local" bill.							
9	ADT shall update the filed information within 30 days of any change. This							
10	additional filing will clarify ADT's commitment to provide Lifeline and Link Up services.							
11	Public Interest Determination							
12	We focus our public interest determination on the potential benefits the							
13	consumer could receive from the ETC designation of ADT. Elements we consider							
14	determining public interest include:							
15	New choice for customers							
16	<ul> <li>Affordability</li> </ul>							
17	Quality of service							
18	Service to unserved customers							
19	Comparison of benefits to public cost.							
20	We also consider the record to determine if there is material harm to any ratepayer in							
21	granting the ETC application.							
22	New Choice for Customers							
23	During the hearing to consider the issue of public interest, ADT provided							
24	evidence that, with ETC designation and associated USF funds, customers will have							
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a) the base local rate(s) and description of service for the service offerings

improved access to ADT's network and more choices in telecommunication services.<sup>31</sup>
ADT distinguishes its service offerings from other competing wireless carriers by noting it will be providing services available to any customer on reasonable request, and it will offer Lifeline and Link Up services, and E-911 services.

We conclude that granting the ETC application will improve customers'

We conclude that granting the ETC application will improve customers' ability to obtain ADT wireless services. Two consumers supported the ADT application because of the increased coverage ADT would offer, improving access to emergency and other critical services as well as quality of life.<sup>32</sup> As ADT invests in its network, competing companies' investment incentives may increase.

Granting the application will also provide customers more choices for meeting their communications needs. Low-income customers who otherwise would be unable to afford wireless service will be able to obtain service using the discounts provided under the Lifeline and Link Up programs. ADT customers will also have a choice in local calling areas, including an option for a wider local calling area than offered by the incumbent MTA.

The public interest is also served by the mobility of ADT's service. Mobile service adds public convenience and provides critical access to health and safety services, not just at the customer's home as the incumbent's system provides, but when the customers are away from their residences.

<sup>&</sup>lt;sup>31</sup>*Id.* at 2.

<sup>&</sup>lt;sup>32</sup>See letters from Sarah Palin and the Mat-Su Community Transit, received May 20, 2003.

# Regulatory Commission of Alaska 701 West Eighth Avenue, Suite 300 Anchorage, Alaska 99501 (907) 276-6222; TTY (907) 276-4533

# Affordability

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While ADT did not offer a rate plan for basic universal service, it did demonstrate a wide array of offerings. Combined with the ability to make calls into metropolitan Anchorage without long distance charges, these offerings could lower costs for consumers. We do not require proof of lower cost because the MTA offerings differ so extensively from ADT's that their costs cannot be meaningfully compared.

# Quality of Service

We do not currently regulate the quality of service by ADT, nor do we have sufficient evidence to warrant defining quality of service standards to apply to wireless carriers. However, we will review service quality issues if we receive customer complaints about ADT's service. This decision does not preclude us from considering ETC service quality in a regulations docket upon petition or our election.

# Service to Unserved Customers

ADT asserted the designation would allow it to accomplish build-out of six additional cell sites.<sup>33</sup> ADT expects to reach unserved customers in Trapper Creek, Petersville and Cantwell.<sup>34</sup>

The RC claims the designation will not provide benefit, and that ADT wants the benefits of ETC status without the commensurate obligations to serve hard-to-reach customers.<sup>35</sup> MTA argues that ADT makes no firm commitment regarding its six cell sites and that ADT would not achieve economic viability regarding the site additions even with support. MTA believes that rather than constructing facilities in

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<sup>&</sup>lt;sup>33</sup>*Id.* at 9.

<sup>&</sup>lt;sup>34</sup>*Id.* at 9, 12.

<sup>&</sup>lt;sup>35</sup>Prefiled Testimony of Jack H. Rhyner, filed April 14, 2003, at 10.

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areas like Trapper Creek, Petersville, and Cantwell, ADT will instead use its funding to benefit the high-density, lower cost areas that ADT already serves.

We find nothing in the record to substantiate MTA's claim; rather, ADT has clearly stated on the record it would seek out new customers. Two letters filed by consumers suggests that customers in the MTA area may at times be without wireline service and that these customers may desire ADT's services.<sup>36</sup> We conclude that by granting this application, we will improve the ability of customers not now served by wireline to obtain access to wireless service. As an ETC, ADT will be obligated to provide service to currently unserved consumers upon reasonable request.

# Comparison of Benefits to Public Cost

The RC and MTA argued that we should not grant ADT ETC status unless we can prove that the benefits of the designation would exceed the public costs. We find no support in the law for application of this standard to our review of ADT's ETC Furthermore, we find that while improvement in public safety and application. convenience and other public benefit factors cannot easily be quantified, they provide substantial benefit to the public.<sup>37</sup> There was no credible evidence in the record of countervailing public costs.

# Considerations of Material Harm

We considered whether there would be any material harm in granting the ETC application. The record is virtually silent concerning substantive harm specific to

<sup>&</sup>lt;sup>36</sup>See letters from Sharla Toller and Becky and Steve DeBusk, received May 20, 2003.

<sup>&</sup>lt;sup>37</sup>The FCC has indicated that concerns about the financial impact of designating competitors as ETCs on the federal fund are not relevant to designating a particular carrier as an ETC. In Re Federal State Joint Bd. on Universal Service; RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama, CC Docket No. 96-45, Memorandum Opinion and Order, 17 F.C.C.R. 23532, para. 3 (2002).

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MTA or to customers in the MTA service area. MTA admits that its own federal funding will likely not be affected by our decision to grant the application.<sup>38</sup> evidence that MTA will lose a significant number of customers as a result of increased competition by wireless services. There is no evidence that consumer local rates will increase or that quality or availability of service will decrease as a result of granting the application. We did not find persuasive evidence in this proceeding suggesting generic harm to either the federal universal service fund or to customers generally by granting the application. We find no evidence to suggest that any material harm will occur.

In summary, we find that granting ETC status to ADT is in the public interest. We previously concluded that ADT adequately demonstrated that it met all other criteria necessary to allow award of ETC status. We therefore grant ETC status to ADT.

# Conditions on ETC Status

Various parties have recommended that we should place quality of service requirements on ADT as a condition of ETC status. We will not develop quality of service standards for wireless carriers in this proceeding. We lack a record demonstrating that such standards are needed. We will consider wireless quality of service standards in the future, provided a need for such standards is proved.

When GCI obtained ETC status for the ACS Rural LECs' study areas, we prohibited GCI from applying for support for a study area until it had filed a certificate,

<sup>&</sup>lt;sup>38</sup>MTA's Reply at 29. MTA qualified its answer by stating that its support would not decrease, but only under the current rules, and that the FCC and the Federal-State Joint Board on Universal Service were actively considering proposals to change the federal universal service program. While that may be the case, we cannot assume that federal policies will necessarily change to disadvantage MTA or that our decision to grant ADT ETC status will as a result harm MTA in the long term.

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supported by an affidavit, demonstrating availability of service and advertising thereof.<sup>39</sup> We will not place a similar requirement on ADT for the following reasons:

- a) ADT has applied for service in only one study area, unlike the GCI request for ETC status in multiple study areas;
- b) GCI indicated it would phase-in service. In comparison, ADT has provided a 7 Step plan for providing service throughout the study area;
- c) When we granted GCI ETC status, companies had not implemented plans to disaggregate support below the study area level.

The RC urges us to levy conditions on ADT to verify that ADT meets its obligations and to ensure parity between new ETCs and the incumbent local exchange carrier. We may require conditions within narrow bounds set by the Act and further identified in the Texas Office of Public Utility decision. 40 The parties argued about the extent of our authority.41 In a number of recent decisions on ETC designation, state commissions that granted ETC status attached significant conditions on commercial mobile radio service carriers.42

ADT argues that the competitive market makes conditions of service quality and affordability redundant. ADT urges us to annually review the way USF funds are spent to monitor service quality.<sup>43</sup>

Many of the proposed conditions are designed to protect incumbent carriers from market participation concerns by a competitive ETC, such as cream

<sup>&</sup>lt;sup>39</sup>See Order U-01-11(1), dated August 28, 2001.

<sup>&</sup>lt;sup>40</sup>See n. 12.

<sup>&</sup>lt;sup>41</sup>Tr. 159, 211.

<sup>&</sup>lt;sup>42</sup>Tr. 211, 215.

<sup>&</sup>lt;sup>43</sup>Rebuttal Testimony of Don Wood on Behalf of Alaska DigiTel, LLC, filed May 5, 2003, at 14; Tr. 371-72, 379.

skimming. The FCC has previously rejected rural incumbent carriers' suggestions to adopt eligibility criteria beyond those set forth in Section 214(e) to prevent competitive carriers from attracting only the most profitable customers, providing substandard service, or subsidizing unsupported services with universal service funds. The FCC concluded that the statutory requirements limiting ETCs, and requiring them to offer services throughout the area and to use support only for the intended services, were sufficient.<sup>44</sup> Similarly, we find little evidence that further protections are needed to protect MTA's place in the market.

# Annual Certification

Each year we open a proceeding and issue an order requiring information from the economically regulated ETCs operating in Alaska so that we may make our annual certification to the FCC concerning use of federal universal service funds under 47 C.F.R. § 54.314. As an ETC, MTA submits data in these annual proceedings.

Under federal regulations, an ETC not subject to our jurisdiction that desires to receive federal universal service support must file an annual certificate with the federal fund administrator and the FCC stating that all federal high-cost support received will be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. We do not economically regulate ADT, and therefore, under federal law, ADT would normally only file its certification with the FCC. We are not required to certify to the FCC whether ADT will appropriately use federal universal service funds. However, in order to monitor the continued appropriate use of universal service funding in our competitive rural markets, we require ADT to file the

<sup>&</sup>lt;sup>44</sup>In Re Federal-State Joint Board on Universal Service; Western Wireless Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming, CC Docket No. 96-45, Memorandum Opinion and Order, 16 FCC Rcd 48, 53, paras. 12-13 (CCB 2000).

same information required of MTA through our annual use-of-funds certification process. ADT has agreed to do so.

# Service Area

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Under Section 214(e)(1), a carrier's ETC status is linked to a specific In its comments, MTA states that the topographical map of ADT's "service area." proposed service area, as marked by ADT in Exhibit A to its May 14, 2002, filing, does not correspond to the serving area referenced in the MTA tariffs filed with this Commission. As a result, MTA believes ADT planned to serve something less then MTA's service area. MTA states that if ADT had no intention of serving MTA's entire study area, then it must lodge a request to redefine the service area boundary. 45

We clarify that under federal law, ADT's ETC service area must be the same as the MTA study area.46 Consistent with the federal requirements, ADT indicates it would serve the MTA study area and our approval of ADT's ETC status is for this study area. Should there be a dispute over the extent of MTA's study area, we will resolve such disputes when they occur.

# State USF

ADT indicated it had no plan to apply for state universal service support. We will not require that ADT file for such support. However, our regulations provide that ADT, if granted federal ETC status, automatically becomes eligible for state universal service funds. See 3 AAC 53.399(3). We anticipate that ADT will obtain only minimal support from our state fund, as it will likely only qualify for support for Lifeline services.

<sup>&</sup>lt;sup>45</sup>MTA's Reply at 3, 8.

<sup>&</sup>lt;sup>46</sup>See 47 U.S.C. § 214(e)(5). The service area cannot be changed from the study area unless and until the FCC and the states, after taking into account recommendations of a Federal-State Joint Board institute under section 410(c) of the Act. a different definition of service area for such company.

This order constitutes the final decision in this phase of the proceeding. This decision may be appealed within thirty days of the date of this order in accordance with AS 22.10.020(d) and the Alaska Rules of Court, Rule of Appellate Procedure (Ak. R. App. P.) 602(a)(2). In addition to the appellate rights afforded by AS 22.10.020(d), a party has the right to file a petition for reconsideration as permitted by 3 AAC 48.105. If such a petition is filed, the time period for filing an appeal is then calculated under Ak. R. App. P. 602(a)(2).

# ORDER

# THE COMMISSION FURTHER ORDERS:

- 1. The application filed by Alaska DigiTel, LLC requesting that it be designated as a carrier eligible to receive federal universal service support under the Telecommunications Act of 1996 in the Matanuska Telephone Association, Inc. stularea is granted.
- By 4 p.m., September 8, 2003, Alaska DigiTel, LLC shall file certification, supported by an affidavit, demonstrating that it will advertise its services as specified in the body of this Order.
- 3. By 4 p.m., September 8, 2003, Alaska DigiTel, LLC shall provide the information concerning emergency services, Lifeline services, and Link Up services as specified in the body of this Order.
- Alaska DigiTel, LLC shall maintain on file with this Commission the
   Lifeline and Link Up information specified in the body of this Order.

Regulatory Commission of Alaska

5. To the extent possible, Alaska DigiTel, LLC shall file as if it were a regulated carrier in response to our requests for information in our annual proceeding concerning annual certification of use of funds to the Federal Communications Commission.

DATED AND EFFECTIVE at Anchorage, Alaska, this 28th day of August, 2003.

BY DIRECTION OF THE COMMISSION (Commissioners Dave Harbour and Kate Giard, not participating.)

(SEAL)

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# BEFORE THE ARIZONA CORPORATION COMMISSION Anzona Corporation Commission

CARL J. KUNASEK

Chairman

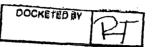
JIM IRVIN Commissioner

WILLIAM A. MUNDELL

Commissioner

DOCKETED

DEC 1 5 2000



6 IN THE MATTER OF APPLICATION OF SMITH ) BAGLEY, INC., FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNCIATIONS CARRIER ) UNDER 47 U.S.C. § 214(e)(2) AND A.C.C.

§ R14-2-1203

DOCKET NO. T-02556A-99-0207

DECISION NO. 63269

**ORDER** 

10 Open Meeting

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December 12 and 13, 2000

Il Phoenix, Arizona

12 BY THE COMMISSION:

# FINDINGS OF FACT

#### 14 1. **Procedural History**

- 15 On April 15, 1999, Smith Bagley, Inc. ("SBI") filed an Application requesting 16 designation as an Eligible Telecommunications Carrier ("ETC") pursuant to Section 214(e)(2) of the 17 Telecommunications Act of 1996 ("Act"), Section 54.201 of the Federal Communication's 18 Commission ("FCC") rules, 47 C.F.R. § 54.201, and Section R14-2-1203 of the Arizona 19 Administrative Code ("Code"), A.C.C. § R14-2-1203.
- 201 In its initial Application, SBI requested designation as an ETC for the entire state of 21 Arizona and that it be designated as eligible to receive all available support from the Arizona Universal 22 Service Fund ("AUSF") and Federal Universal Service fund "(USF") including, but not limited to. 23 support for rural, insular and high cost areas and low income customers.
- 24 3. On June 2, 1999, SBI filed a petition with the FCC seeking designation as an ETC 25 under Section 214(e)(6) for those parts of its service areas in Arizona and New Mexico that encompass 26 federally reserved Indian Lands
- 27 On July 6, 1999, the Common Carrier Bureau sought public comment on SBI's 28 petition. In response, the Arizona Corporation Commission ("ACC" or "Commission") filed

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I comments with the FCC stating that it has jurisdiction over tribal lands served by non-tribally owned 2 telephone companies.

- 5. On July 28, 1999, Arizona Telephone Company ("Arizona Telephone") filed an Application for Leave to Intervene, which was granted on August 9, 1999.
- 6. On August 11, 1999, SBI amended its Application for the purpose of narrowing the 6 scope of its Application to those areas within SBI's existing service area which encompass Native 7 American lands. SBI also requested that where SBI's amended Application includes an area on Native 8 American lands where a telecommunications carrier has already been designated as an ETC, that the ACC find that the designation of SBI as an additional ETC in that area is in the public interest.
- 7. On August 23, 1999, U.S. WEST Communications, Inc. (now "Qwest") filed an Application for Leave to Intervene, which was granted on October 6, 1999.
- 8. On June 30, 2000, the FCC released its Twelfth Report and Order, Memorandum 13 Opinion and Order, and Further Notice of Proposed Rulemaking (FCC 00-208) Promoting 14 Deployment and Subscribership in Unserved Areas, Including Tribal and Insular Areas. In this Order, 15 the FCC adopted "measures to: (1) promote telecommunications subscribership and infrastructure 16 deployment within American Indian and Alaska Native tribal communities; (2) establish a framework 17 for the resolution of eligible telecommunications carrier designation requests under section(e)(6) of 18 the Communications Act of 1934, as amended (the Act); and (3) apply the framework to pending 19 petitions for designation as eligible telecommunications carriers filed by ..., Smith Bagley, Inc., ...
- In its June 30, 2000, Report and Order, the FCC dismissed without prejudice SBI's 2) request for designation under Section 214(e)(6) to permit Arizona to compete its proceeding on the merits of SBI's pending request.
- 10. On August 23, 2000, Table Top Telephone Company ("Table Top") filed an 24 Application for Leave to Intervene which was granted on September 5, 2000.

#### 25||11. Requirements for Designation as an ETC

Section 214(e)(1) of the Communications Act of 1934, as amended, 47 C.F.R. 26 11. 21/214(e)(1) sets forth the requirements for designation of ETC's. It states that "A common carrier 28 designated as an eligible telecommunications carrier, under paragraph (2) or (3) shall be eligible to

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I receive universal service support in accordance with section 254 and shall throughout the service area 2 for which the designation is received - (A) offer the services that are supported by Federal universal 3 service support mechanisms under section 254(c), either using its own facilities or a combination of 4 its own facilities and resale of another carrier's services (including the services offered by another 5 eligible telecommunications carrier); and (B) advertise the availability of such services and the charges 6 therefore using media of general distribution.

- 12. The 1934 Act, as amended, defines "service area" as a geographic area established by 8 a State commission for the purpose of determining universal service obligations and support glimechanisms. In the case of an area served by a rural telephone company, "service area" means such 10 company's "study area" unless and until the Commission and the States, after taking into account Illrecommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company. See 47 U.S.C. Section 214(e)(5).
- Section 54.101 of the FCC's rules and regulations, 47 C.F.R. Section 54.101, sets forth 14 the services that a carrier must offer in order to receive Federal universal service fund support. The 15 services include:
  - Voice Grade Access to the Public Switched Network. "Voice grade access" is (1)defined as a functionality that enables a user of telecommunications services to transmit voice communications, including signaling the network that the caller wishes to place a call, and to receive voice communications, including receiving a signal indicating there is an incoming call. For purposes of this part, bandwidth for voice grade access should be, at a minimum, 300 to 3,000 Hertz;
  - Local usage. "Local usage" means an amount of minutes of use of exchange (2)service, prescribed by the Commission, provided free of charge to end users:
  - Dual Tone Multi-Frequency Signaling of its Functional Equivalent. "Dual tone (3) multi-frequency" (DTMF) is a method of signaling that facilitates the transportation of signaling through the network, shortening call set-up time;
  - (4)Single-party service or its functional equivalent. "Single-party service" is a telecommunications service that permits users to have exclusive use of a wireline subscriber loop or access line for each call placed, or, in the case of wireless telecommunications carriers, which use spectrum shared among users to provide service, a dedicated message path for the length of a user's particular transmission.

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- (5) Access to Emergency Services. "Access to emergency services" includes access to services, such as 911 and enhanced 911, provided by local governments or other public safety organizations. 911 is defined as a service that permits a telecommunications user, by dialing the three-digit code "911", to call emergency services through a Public Service Access Point (PSAP) operated by the local government. "Enhanced 911" is defined as 911 service that includes the ability to provide automatic numbering information (ANI), which enables the PSAP to call back if the call is disconnected, and automatic location information (ALI), which permits emergency service providers to identify the geographic location of the calling party. "Access to emergency services" includes access to 911 and enhanced 911 services to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems;
- (6)Access to Operator Services. "Access to operator services" is defined as access to any automatic or live assistance to a consumer to arrange for billing or completion, or both, of a telephone call;
- Access to Interexchange Service. "Access to interexchange service" is defined (7) as the use of the loop, as well as that portion of the switch that is paid for by the end user, or the functional equivalent of these network elements in the case of a wireless carrier, necessary to access an interexchange carrier's network:
- Access to Directory Assistance. "Access to directory assistance" is defined as (8) access to a service that includes, but is not limited to, making available to customers, upon request, information contained in directory listings; and
- Toll Limitation for Qualifying Low-Income Consumers. Toll limitation for (9)qualifying low-income consumers is described in Subpart F of this part.
- 14. In its First Report and Order in CC Docket No. 96-45, the FCC found that any telecommunications carrier using any technology, including wireless technology, is eligible to receive universal service support if it meets the criteria under section 214(e)(1). The FCC found that wholesale exclusion of a class of carriers by the Commission would be inconsistent with the language of the statute and the pro-competitive goals of the 1996 Act." Id., at para, 145. The FCC further found hat the treatment granted to certain wireless carriers under section 332(c)(3)(A) does not allow states 14 to deny wireless carriers ETC status. Id. The FCC reaffirmed these findings in both its Seventh Report and Order and in its Ninth Report and Order and Eighteenth Order on Reconsideration on Universal Service, CC Docket No. 96-45, finding that "federal universal service high-cost support 26

Decision No. 63269

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I should be made available to all eligible telecommunications carriers that provide the supported 2 services, including wireless carriers, regardless of the technology used" (Ninth Report and Order and 3 Eighteenth Order on Reconsideration at para. 89).

- In order to be designated as an ETC, a carrier must also offer Lifeline and Link Un 15. 5 Service to all qualifying low-income consumers within its service area. See 47 C.F.R. Sections 54.405 6 and 54.411(a). The FCC, in its Twelfth Report and Order, Memorandum Opinion and Order, and 7 Further Notice of Proposed Rulemaking in CC Docket No. 96-45, created a fourth tier (\$25 per 8 month) of Federal Lifeline support and established additional Link Up support (\$70 per consumer) which is available to ETC's serving qualifying low-income individuals living on tribal lands.
- A State commission may, in the case of an area served by a rural telephone company. 16. Illand shall, in the case of all other areas, designate more than one common carrier as an Eligible 12 Telecommunications Carrier for a service area designated by the State commission, so long as each 13 additional requesting carrier meets the requirements of 47 U.S.C. Section 214(e)(1). Before 14 designating an additional Eligible Telecommunications Carrier for an area served by a rural telephone 15 company, the State commission shall find that the designation is in the public interest. See 47 U.S.C. 16 214(e)(2).

#### SBI's Compliance with the Requirements for ETC Designation III.

#### Offering the Services Designated for Support 18 A.

- SBI states that it currently offers the services designated for support by the Federal 17. 19 20 universal support mechanisms under 47 U.S.C. §51,101(a) which include the following:
  - 1. Voice grade access to the public switched network.
  - 2. Local usage.
  - 3. Dual tone, multi-frequency signaling or its functional equivalent.
  - 4. Single party service or its functional equivalent.
  - 5. Access to emergency services.
  - 6. Access to operator services.
  - 7. Access to interexchange service
  - 8. Access to directory service.
  - 9. Toll limitation for qualifying low-income consumers.
- Initially, SBI intends to provide analog wireless service to its subscribers taking service 28 under its universal service plan. The Company plans to upgrade its system to provide digital coverage

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I lin the near future, and it believes that the cost of digital subscriber equipment will continue to fall such 2 that it will be almost as economically efficient to provide subscribers with digital service as it is today 3 to provide analog service.

- 19. In areas where SBI's signal is strong, customers will receive excellent call quality on 5 an analog network using a hand-held phone. In areas where the signal is not as strong, SBI will 6 employ a higher quality external vehicle antenna that increases reception to ensure appropriate 7 reception and corresponding call quality. SBI will also make available a higher power three watt g portable phone for those customers who want the benefits of higher transmitter power without having 9 the phone fixed-mounted in a vehicle. Finally, SBI will install a Yagi antenna in those areas where [0] signal strength is inadequate to provide customers with a hand-held phone. The antenna will be connected to a fixed telephone mounted inside the house.
  - SBI's network has been operational for nearly ten years. The Company has worked 20. with five Native American tribes to secure adequate cell sites on Native American lands.
- 21. SBI will provide voice grade access to the public switched network. SBI states the bandwidth reserved for the cellular voice channel meets the prescribed range. 15
- SBI will provide the minimum number of free minutes as prescribed by the FCC 22. pursuant to Section 54.101(a)(2). Its current plan proposes 30 free minutes per month throughout 18 SBI's network, which is a much greater local exchange area than currently provided by LECs in this 19 region. In addition, SBI's plan provides for unlimited free calls to a long list of government, social 20) service, health facilities, educational institutions, and emergency numbers throughout SBI's network.
- SBI's system currently provides Dual Tone Multi-Frequency signaling throughout its network. SBI provides single party service, as that term is defined in Section 54.101 of the FCC's 23 rules. SBI will provide to emergency services, including access to 911. SBI will also implement E-24 911 in full compliance with ongoing FCC requirements.
- 24. SBI provides operator services to its customers. SBI also intends to have at least one 25 26 Native American language speaking operator on line at all times to assist Native American callers who 27 do not speak English. SBI will provide its customers with access to directory assistance, as well as 28 a directory listing, upon request.

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- 26. SBI stated in response to a Staff Data Response that it will offer each subscriber 30 6 minutes of airtime access on a monthly basis for a simple access fee of \$24.99 per month, paid on 7 behalf of each qualified subscriber, with additional airtime being available via prepaid minutes. The service provided will include free access to all essential numbers such as 911, and all police, fire and 9 safety agencies, hospitals and health agencies, forest services, etc. These calls would not count against 10 the included 30 minute allotment per subscriber. SBI also stated that it will offer at numerous [1] convenient locations on the reservations, additional prepaid airtime minutes at 0.49 per minute peak, and 0.34 per minute off-peak to any subscriber desiring additional access.
- 27. SBI believes that its proposal compares favorably with landline service offerings. For example, Navajo Communications Company charges \$15.90 for a single residential access line. This 15 access provides a local calling area which is a small fraction of that provided by SBI, and with most 16 calls being toll, 30 minutes of toll calling will result in an approximate total charge of \$25.40 for the wireline package as opposed to \$24.99 for the equivalent SBI offering.
- 28. SBI states that it will offer a universal service subscriber rate plan that will permit 19 Native American subscribers qualifying for Federal and State Lifeline assistance to pay \$1.00 per 20 month for service, which will include at least 200 minutes of local air time, and a substantial list of toll free calls to local agencies, hospitals, community centers and emergency numbers. The service will also contain features, such as caller identification, call waiting, toll blocking, and call forwarding that subscribers may find useful. 23
  - 29. SBI also states that it will require no additional monies for infrastructure costs. The current network is sufficient to handle significant increases in users and any potential additions will be paid for by SBI according to traffic loads and traditional business criteria.
- Based upon the above, the Staff concludes that SBI will offer the supported services 30) either using its own facilities or a combination of its own facilities and resale of another carrier's

I services and that its meets this requirement of Section 214(e)(1)(A) of the Communications Act, as 2 amended. Staff recommends that the Commission find that SBI meets this requirement for ETC 3 designation.

#### 4 B. Advertising of Supported Services

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- SBI states that it advertises the availability of such services and the charges therefore 6 using media of general distribution as required by 47 U.S.C. §214(e)(1)(B). Application at p. 5. SBI 7 further states that the methods of advertising utilized include television, newspaper, magazine, radio, 8 direct mailings, public exhibits and displays, bill inserts, and telephone directory advertising. Id. SBI 9 submitted examples of relevant advertisements as part of its Application. SBI also states that it will 10 publish advertising material in the Native American language.
- 32. Based upon the above, the Staff concludes that SBI advertises the availability of supported services and charges using media of general distribution as required by 47 U.S.C. Section [214(e)(1)(B) of the Communications Act, as amended. Staff recommends that the Commission find 14 that SBI also meets this ETC designation criteria.

#### C. Universal Service Support Area

- 33. The Commission must establish a geographic area for the purpose of determining Juniversal service obligations and support mechanisms for each designated ETC. See 47 U.S.C. Section 214(e)(2); 47 C.F.R. Section 54.201(b).
- In areas served by a rural telephone company, however, the FCC's rules define "service 20 area" to mean the LEC study area. See 47 C.F.R. Section 54.207(b). Where the requested service area 21 differs from the LEC study area, the state and/or carrier must also obtain FCC approval of the modified 22 service area definition. See 47 C.F.R. Section 54.207(c)(1).
- In its amended Application, SBI requests ETC status for "those areas within its existing 23 24 service contour which encompass Native American lands, as illustrated on the map attached" to its 25 Application. Id. at p. 1.
- SBI states that this includes Native American lands located within SBI's service area, 26 27 which includes the Navajo Nation, the Hopi Nation and the White Mountain Apache Tribe. These 28 areas are served by four rural LECs: Navajo Communications Company, Table Top Telephone

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- 37. SBI states that it is not licensed along LEC study area boundaries, and is therefore unable to obtain FCC authority to provide wireless service to the entire LEC study areas of Navajo. Citizens, and Century Tel. October 27 2000, Letter at p. 2. SBI states that it will serve all of the 6 reservation area within the four rural LEC's wire centers, with the exception of five. Id. Three 7 wirecenters extend beyond SBI's FCC authorized service area. The other two wirecenters contain area which, is outside of the Native American Reservation boundary for which SBI has requested authority to operate. Id.
- In determining whether to define the service area of SBI differently then the LEC study 38. 10 Il area, the Commission must consider three factors. See, Federal-State Joint Board on Universal 12 Service, Recommended Decision, Docket 96-45, 12 FCC Rcd 87 (1996).
- First, the Commission must consider whether SBI is attempting to "cream skim" by 39. only proposing to serve the lowest cost exchanges. Recommended Decision at para. 172. SBI states 15 that it has not selected the lowest-cost areas of rural LECs' service areas. SBI further states it has 16 requested to serve the low-density high cost exchanges on Native American lands, where it has 17 obtained an FCC license to serve and has designated such areas indiscriminately with its FCC 18 authorized service area boundary. SBI states that in other areas, other carriers hold cellular licenses. 19 precluding SBI from providing service. Id. SBI also states that its proposed service area is based on 20 its desire to serve the Native American population and believes that the Commission's examination of the proposed service area demographics and telephone penetration rates will lead to the conclusion that cream skimming is not a concern. Id. 22
- Second, the Commission must consider the rural carrier's special status under the 1996 40. 24 Act. Recommended Decision at para. 173. SBI states that no action in this proceeding will affect or 25 prejudge any future action the Commission may take with respect to the rural LECs' status as rural 26 telephone companies, or future competitive ETC requests. October 27, 2000 Letter at p. 4. SBI also 27 states that desegregation of rural LEC service areas down to the wire center level will in no way 28 change the special status of the rural LECs involved in this case. SBI states that the exemptions

I provided to rural LECs under the 1996 Act pertaining to interconnection, unbundling and resale requirements will remain intact even if service areas are desegregated. Id.

- Third, the Commission must consider the administrative burden a rural LEC could face 41. 4 as a result of the proposed service area designation. Recommended Decision at para. 174. SBI states 5 that no additional administrative burden will be incurred by any of the rural LECs in this case. SBI 6 states that the LECs may continue to calculate costs on a study area basis, and SBI will in the interim 7 collect from the Federal high cost loop fund whatever the LFC would receive. October 27, 2000. 8 Letter at p. 4. Accordingly, disaggregating at the wire center level, argues SBI, would not result in any 9 additional administrative burdens for the rural LECs, Id.
- SBI further states that the requirement that SBI serve an entire LEC study area is an 42. absolute barrier to entry for SBI and would thwart the goals of the universal service program. 12 October 27, 2000, Letter at p. 5.

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The Staff recommends, based upon the above, that SBI's service area should be defined 43. consistent with that portion of its existing cellular service contour which encompass that portion of 15 the Navajo Indian Reservation located in Navajo and Apache Counties, that portion of the Hopi Indian Reservation located in Navajo County, on the Pueblo of Zuni Reservation located in Apache County and that portion of the White Mountain Apache Reservation located in Navajo, Apache and Gila 17 18 Counties, with the exception of the Sanders exchange of Table Top Telephone Company which shall 19 be subject to an expedited comment or hearing process as agreed to by the parties to determine whether the Sanders exchange should be included in Smith Bagley, Inc.'s ETC service area. Consideration of 21 the three factors discussed together with the information on each supplied by the Company supports 22 the conclusion that the Company is not attempting to "cream skim" by proposing to serve the lowest 23 cost exchanges. The information provided supports just the opposite conclusion that the Company will 24 in actuality be extending service into many currently unserved or underserved high cost areas which 25 traditional wireline carriers may never serve. Additionally, SBI has established to the Staff's satisfaction that the rural carriers' special status under the 1996. Act will not be adversely affected.

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| Finally, there should be no administrative burden imposed upon the rural LECs since desegregating 2 the service area at the wire center level will not impact the rural LECs current calculation of costs on a study area basis.

#### D. Public Interest Criteria 4

- 44. Under Section 214(e)(2) the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common 7 carrier as an Eligible Telecommunications Carrier for a service area designated by the State 8 commission, so long as each additional carrier requesting ETC status meets the requirements of 47 9 U.S.C. Section 214(e)(1). Before designating an additional Eligible Telecommunications Carrier for 10 an area served by a rural telephone, the State commission shall find that the designation is in the public [ ] interest.
- SBI's Application requests ETC designation on Native American lands located within 13 SBI's service area, which includes the Navajo Nation, the Hopi Nation and the White Mountain 14 Apache Tribe. October 27, 2000, Letter at p. 2. These areas are served by four rural LECs: Navajo 15 Communications Company, Table Top Telephone Company, Citizens Utilities Company, and CenturyTel of the Southwest, Inc.
- SBI states that competition will promote lower prices and the availability of advanced 46. 17 technologies to unserved and underserved areas. October 27, 2000, Letter at p. 5.
  - SBI also cites an FCC Order wherein the FCC observed that historically the Native 47. American community has been deprived of advanced telecommunications options. See Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, CC Docket No. 96-45, FCC 00-208, para. 24-28 (Rel. June 30, 2000). October 27, 2000, Letter at p. 5.
- 48. American Indian and Alaska Native communities, on average, have the lowest reported 25 telephone subscribership levels in the country (FCC 00 208 ¶5). SBI states that according to data in 26 the Benton Foundation's April, 1999 study entitled "Native Networking: Telecommunications and

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Other Criteria

53 In para, 142, of the FCC's First Report and Order in Docket No. 96-45, the FCC 27 28 rejected proposals that all carriers designated as eligible to receive interstate universal service support

IllInformation Technology in Indian Country" that for the Arizona Tribes within its service area, 81.6 2 percent of the Navaho Nation, 49.3 percent of the Hopi and 64.5 percent of the White Mountain 3 Apache are without a telephone in their home.

- 49. Currently SBI's licensed service area includes approximately 100,000 potential Native American subscribers. Most live in remote areas where it is cost prohibitive to provide traditional 6 wireline telecommunications services. Application at p. 3. SBI states that in many portions of its 7 service area, SBI is the only telecommunications provider offering any service and it is doubtful that any wireline carrier will ever extend lines to these areas. Application at p. 3. SBI further states that 9 roughly six people reside in each square mile covered by SBI. Id. SBI also states that it is willing to 10 expend the resources necessary to offer Basic Local Exchange Telephone Service to every potential [1] subscriber in its licensed service area. Application at p. 3.
- 50. SBI states that within the Navajo Nation, telephone subscribership stands at roughly 23 percent. Application at p. 3. SBI further states that it is already developing innovative programs 14 targeted at the large number of people who have no telephone service. Id. SBI's network covers 15 almost all of Navajo and Apache counties and SBI plans further expansion into Coconino County and 16 other unserved areas, with its goal being to provide usable signal to as many Native American persons as possible. Id.
- 51. SBI also states that it has diligently constructed its network so as to reach these 19 unserved areas which wireline telephone companies readily admit may never be reached by wire. 20 Application at p. 3.
- 52. Staff has reviewed SBI's Application and believes that it will provide additional 22 consumer choice, promote telephone subscribership for qualifying low-income Native American's, 23 may reduce health and safety risks associated with geographic isolation and further promotes access 24 to basic telephone service. Therefore, Staff recommends that the Commission find that SBI's 25 Application is in the public interest.

"Notwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."

55. However, an important exception to this provision is contained in the next sentence of 13||47 U. S.C. Section 332(c)(3)(A):

> "Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from the requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates."

- Texas Office of Public Utility Counsel v. FCC, supra., the Fifth Circuit found that 56. 20 nothing in subsection 214(e) of the Act prohibits the States from imposing their own eligibility 21 requirements. The Fifth Circuit reversed that portion of the Order prohibiting the States from 22 Imposing any additional requirements when designating carriers as eligible for Federal universal 23 service support.
- Accordingly, Staff recommends SBI's Application be granted subject to the following 57. 25 conditions:
  - SBI be required to file a tariff with the Commission within thirty (30) days of (1)this Order. Such Tariff shall include SBI's rates, terms and conditions of service and local calling areas. SBI shall provide the Commission ten (10) business days' notice of any revisions to the tariff. Such tariffs shall also include the Company's proposed Lifeline and Link Up offerings.

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SBI be required to file service area maps for the areas it is granted ETC status (2) by the Commission within thirty (30) days of this order. 2 (3) SBI be required to provide service quality data within thirty (30) days of a 3 request by Commission Staff. . (4) SBI shall submit any consumer complaints that may arise from its offering as 5 an ETC to the Commission's Consumer Service Division and provide a regulatory contact. SBI shall submit its advertising plan for Lifeline and Link Up services to Staff (5)for review prior to commencing service. 9 F. SBI's Application for State Universal Funds In its Application, SBI also requested that it be designated as eligible to receive all 58. 10 11 available support from the Arizona Universal Service Fund ("AUSF"). 59. However, SBI did not comply with the applicable Commission rules to be designated 12 13 as eligible for State AUSF funds. See A.C.C. R14-2-1204, et seq. Staff, therefore, recommends denial of this portion of the Company's Application at 14 60. 15 this time. **CONCLUSIONS OF LAW** 16 SBI is a telecommunications corporation as defined in A.R.S. § 40-201, 47 U.S.C. 17 18 Section 153(44), 47 C.F.R. Section 51.5 and Part 54 of the FCC's rules, 47 U.S.C. Section 54 et seu. SBI is also a Commercial Mobile Radio Service provider as defined in 47 U.S.C. § 153(27) and 20 A.C.C. § R14-2-1201. The Commission has jurisdiction over the subject matter of this Application. Under 2. 21 22 || Section 214(e)(2), a State commission shall upon its own motion or upon request designate a common 23 carrier that meets the requirements of the Act, as an eligible telecommunications carrier for a service 24 area designated by the State commission. The Commission may designate, in the case of an area 25 served by a rural telephone company, and must designate, in the case of all other areas, more than one 26 common carrier as an eligible telecommunications carrier. See 47 U.S.C. Section 214(e)(2). Before 27

designating an additional carrier for an area served by a rural telephone company, the Commission must find that the designation is in the public interest. Id. SBI also provides Basic Local Exchange Telephone Service as defined in A.C.C. Section R14-2-1201(6). 3

- Under 47 U.S.C. Section 214(e)(1), a common carrier that is designated as an Eligible 3. Telecommunications Carrier must, throughout its service area, offer the services that are supported by federal universal service support mechanisms either using its own facilities or a combination of its own facilities and resale of another carrier's services. The carrier must also advertise the availability of such services and the rates for the services using media of general distribution.
- Under 47 U.S.C. Section 214(e)(2) the Commission must establish the geographic area 4. 9 for the purpose of determining universal service obligations and support mechanisms. In areas served 11 by a rural telephone company, however, the FCC's rules define "service area" to mean the LEC study 12 area. See, 47 C.F.R. Section 54.207(b). Where the requested service area differs from the LEC study 13 area, the state and/or carrier must also obtain FCC approval of the modified service area definition. 14 See, 47 C.F.R. Section 54.207(c)(1). Upon consideration of the factors set forth in the Federal-State Joint Board on Universal Service, Recommended Decision, Docket 96-45, 12 FCC Red 87 (1996). 16 SBI's service area should be defined consistent with that portion of its existing cellular service 17 countour which encompass that portion of the Navajo Indian Reservation located in Navajo and 18 Apache Counties, that portion of the Hopi Indian Reservation located in Navajo County, on the Pueblo of Zuni Reservation located in Apache County and that portion of the White Mountain Apache Reservation located in Navajo. Apache and Gila Counties, with the exception of the Sanders exchange 21 of Table Top Telephone Company which shall be subject to an expedited hearing or comment process as agreed to by the parties to determine whether the Sanders exchange should be included in Smith 23 Bagley, Inc.'s ETC service area.
- Under 47 C.F.R. Section 54.405 and 47 C.F.R. Section 54.411, as part of its obligations 5. 25 as an Eligible Telecommunications Carrier, the carrier is required to make available Lifeline and Link 26 Up services to qualifying low-income customers.

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15 16 qualifying low-income Native Americans no later than May 31, 2001.

IT IS FURTHER ORDERED that SBI shall file with the Commission a tariff including the 18 rates, terms and conditions of service and the local calling areas included therein within thirty (30) 19 days of this Order.

IT IS FURTHER ORDERED that SBI shall comply with the remaining conditions of Findings 21 of Fact paragraph 57.

IT IS FURTHER ORDERED that the Company shall make whatever applications are 23 necessary with the FCC, subject to ACC Staff review, for designation of a modified service area 24 definition consistent with that portion of its existing cellular service contour which encompass that 25 portion of the Navajo Indian Reservation located in Navajo and Apache Counties, that portion of the 26 Hopi Indian Reservation located in Navajo County, on the Pueblo of Zuni Reservation located in

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Apache County and that portion of the White Mountain Apache Reservation located in Navajo, 2 Apache and Gila Counties for purposes of receiving Federal universal service support pursuant to 47 3 C.F.R. Section 54.207(c)(1). IT IS FURTHER ORDERED that there shall be an expedited hearing or comment process as 5 agreed to by the parties to determine whether the Sanders exchange of Table Top Telephone Company 6 should be included in Smith Bagley, Inc.'s ETC service area. IT IS FURTHER ORDERED that this Decision shall become effective immediately. 8 BY ORDER QE THE ARIZONA CORPORATION COMMISSION 9 10 11 COMMISSIONER IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive 12 Secretary of the Arizona Corporation Commission, have 13 hereunto, set my hand and caused the official seal of this Commission to be affixed at the Capitol, in the City of Phoenix, this 15 day of Jeans 2000. 15 16 BAIAN C. McNEIL 17 Executive Secretary 18 19 DISSENT: 21 DRS:RLB:jbc/ 22 23 24 25 26 27 28

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SERVICE LIST FOR: SMITH BAGLEY, INC. DOCKET NO: T-02556A-99-0207 3 Mr. David A. LaFuria Lukas, Nace, Gutierrez & Sons 4 1111 Nineteenth Street, N.W. Suite 1200 Washington, D.C. 20036 Mr. Timothy Berg 7 Fennemore Craig 3003 N. Central Avenue Suite 2600 Phoenix, AZ 85012-2913 Mr. Jeffrey W. Crockett Mr. Jeffrey B. Guldner 11 Snell & Wilmer One Arizona Center 12 Phoenix, AZ 85004-0001 13 Mr. Steven R. Beck Mr. Thomas M. Dethlefs Qwest Corporation 15 1801 California Street Suite 5100 16 Denver, CO 80202 Mr. Michael Grant 18 Mr. odd C. Wiley Gallagher & Kennedy, P.A. 19 2575 East Camelback Rd Phoenix, AZ 85016-9225 20 Ms. Pamela Donovan Supervisor, tariffs 22 CenturyTel Service Group, Inc. 805 Broadway Vancouver, WA 98660-3277 <sup>24</sup>Mr. Richard Watkins Chief Operations Officer Smith Bagley, Inc., dba CELLULARONE 26 1500 S. White Mountain Rd. Show Low, AZ 85901

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## STATE OF IOWA

# DEPARTMENT OF COMMERCE

# **UTILITIES BOARD**

IN RE:

MIDWEST WIRELESS IOWA, L.L.C.

DOCKET NO. 199 IAC 39.2(4)

## ORDER DESIGNATING ELIGIBLE CARRIER

(Issued July 12, 2002)

On June 14, 2002, Midwest Wireless Iowa, L.L.C. (Midwest), filed with the Utilities Board (Board) an application for universal service eligible carrier status in Iowa. Midwest asks that the Board designate Midwest as an eligible telecommunication carrier (ETC) pursuant to 199 IAC 39.2(4). No objections have been filed regarding this application.

Board rule 39.2 provides a means by which the Board can designate Iowa telecommunications companies to be eligible to receive funding from the universal service fund, as defined by the Telecommunications Act of 1996, 47 U.S.C. § 254. Under the Act (and Federal Communications Commission (FCC) regulations implementing the Act), the Board must determine that a carrier meets the following service requirements before it may be designated an eligible carrier as set forth in rule 39.2(4):

 Offer the services supported by the federal universal service fund;

- 2) Offer the services using its own facilities or a combination of its own facilities and resale (47 C.F.R. § 54.201(c) provides that "own facilities" includes purchased unbundled network elements);
  - 3) Advertise the availability of the supported services; and
  - 4) Offer the services throughout the designated service area.

An ETC must also offer a minimum amount of local exchange service, defined in usage minutes, provided with no additional charge to customers. See FCC order No. 98-272, October 26, 1998. See also 199 IAC 39.2(1)"b." The FCC has not yet quantified a minimum amount of local usage required to be included in a universal service offering, but has initiated a separate rule making proceeding to address this issue. Id. Any minimum local usage requirements established by the FCC as a result of that rule making would be applicable to all designated ETCs. The Board understands that Midwest will comply with any and all minimum local usage requirements adopted by the FCC. The Board also understands that until the FCC establishes a minimum requirement, Midwest will offer at least one universal service offering with unlimited local calling.

In its request for designation, Midwest states that it satisfies each of these named requirements. Based upon those unopposed representations and the company's commitment to follow the minimum local usage requirements when adopted by the FCC, the Board finds that Midwest offers the services supported by

the federal universal service fund, using its own facilities or a combination of its own facilities and resale of the facilities of another carrier. The Board finds that Midwest advertises and offers the services throughout its service area as described in Exhibits "C" and "D," which will be its designated service area for purposes of the universal service fund. The Board finds these commitments by Midwest adequate to assure that public interest concerns will be satisfied.

The Board also notes that pursuant to a recent federal mandate, Midwest is required to file a certification regarding its use of universal service funds with the Board by September 10, 2002. This filing will be made pursuant to the Board's recently adopted rule 199 IAC 22.2(7), as described in Docket No. RMU-01-14.

## IT IS THEREFORE ORDERED:

- 1. Eligible telecommunications carrier status is granted to Midwest Wireless Iowa, L.L.C., as requested in its application filed June 14, 2002, subject to the voluntary commitments regarding the local usage requirement as described in the body of this order. The designated service area for Midwest Wireless Iowa, L.L.C., shall be the service territories documented in Attachments "C" and "D" of the application, attached to and incorporated by reference in this order.
- 2. The Executive Secretary of the Utilities Board shall mail copies of this order to Midwest Wireless Iowa, L.L.C., the Universal Service Administration

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Company, the Federal Communications Commission Universal Service Branch, and the Federal Communications Commission Office of the Secretary.

# **UTILITIES BOARD**

	/s/ Diane Munns
ATTEST:	/s/ Mark O. Lambert
/s/ Judi K. Cooper Executive Secretary	/s/ Elliott Smith
Dated at Das Maines Jawa this 12 <sup>th</sup> da	v of July 2002

2004.09.30 09:51:10 Kansas Corporation Commission

# THE STATE CORPORATION COMMISSIONS/ Susan K. Duffs OF THE STATE OF KANSAS

Before Commissioners:

Brian J. Moline, Chair Robert E. Krehbiel Michael C. Moffet

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)	Docket No. 04-RCCT-338-ETC
)	
)	
	) ) )

# ORDER NO. 14 ORDER GRANTING ETC DESIGNATION AND ADDRESSING ADDITIONAL ISSUES

NOW COMES the above-captioned matter for consideration and determination by the State Corporation Commission of the State of Kansas (Commission). Having examined its files and records and being fully advised in the premises, the Commission finds and concludes as follows:

# I. BACKGROUND

- 1. On October 10, 2003, RCC Minnesota, Inc. (RCC) filed its petition seeking designation as an Eligible Telecommunications Carrier (ETC) for all available support from the Federal Universal Service Fund (FUSF) including, but not limited to, support for rural, insular and high-cost areas and low-income customers. The application included a request for redefinition of the service area of some rural carriers and Southwestern Bell Telephone Company (SWBT).
- 2. SWBT, Independent Telecommunications Group, Columbus et al. (ITG), the State Independent Alliance (SIA) and WWC License, LLC d/b/a Western Wireless (Western Wireless) intervened in the docket.

- 3. On December 17, 2003, the Commission issued an order setting out a procedural schedule to, among other things, establish dates by which testimony was due to be filed. These testimony filing dates were modified by further order of the Commission.
- 4. Staff, ITG, SIA and Western Wireless filed rebuttal testimony on January 22, 2004. Surrebuttal testimony was filed by RCC and cross-answering testimony was filed by Staff, ITG and Western Wireless on March 4, 2004. In addition, Staff filed supplemental testimony on March 23, 2004 and RCC filed additional testimony on April 12, 2004.
- 5. An evidentiary hearing was held on April 27-28, 2004. Mark P. Johnson, James Kirkland and David A. LaFuria appeared for RCC. James P. Zakoura appeared for Western Wireless. Bruce Ney appeared for SWBT. Thomas E. Gleason, Jr., appeared for ITG. James M. Caplinger and Mark E. Caplinger appeared for SIA. Robert E. Lehr appeared for Staff and the public generally.
- 6. Staff and Western Wireless filed initial post-hearing briefs on June 4, 2004. ITG, SIA and RCC filed initial post-hearing briefs on June 7, 2004. Staff, SIA and ITG filed reply briefs on June 21, 2004. RCC filed its reply brief and a compendium of state and Federal decisions on wireless ETC issues on June 22, 2004.

# II. FEDERAL ETC REQUIREMENTS

- 7. Section 214(e) of the Federal Telecommunications Act of 1996 (Federal Act) discusses the requirements that a company must meet in order to be designated an ETC and the role of this Commission in making the determination. Section 214(e)(1)-(2) states:
  - (e) Provision of Universal Service.
  - (1) Eligible telecommunications carrier. A common carrier designated as an eligible telecommunications carrier under paragraph (2) or (3) shall be

<sup>&</sup>lt;sup>1</sup> The surrebuttal testimony of Don Wood on behalf of RCC was late-filed on March 5, 2004, by order of the Commission.

eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received;

- (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carriers' services (including the services offered by another eligible telecommunications carrier); and
- (B) advertise the availability of such services and the charges therefore using media of general distribution.
- (2) Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirement of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest. 47 U.S.C. §214(e)(1)-(2).

Therefore, before designating RCC as an ETC in the requested service areas, the Commission must determine:

- a) whether RCC is offering or will be able to offer the supported services using its own facilities or a combination of its own facilities and resale;
- b) whether RCC will offer those services throughout the requested service areas;
- c) whether RCC will advertise the services through media of general distribution; and.
- d) whether designating RCC as an ETC in a service area served by a rural carrier is in the public interest.
- 8. Section 214(e)(5) of the Federal Act defines "service area" as:

The term "service area" means a geographic area established by a State commission for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the [Federal Communications] Commission and the

States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company.

"Service areas" or "operating areas" are defined by the state act in K.S.A. 66-1,187(k). K.S.A. 66-1,187(k) provides that:

- (1) In the case of a rural telephone company, operating area or service area means such company's study area or areas as approved by the federal communications commission;
- (2) in the case of a local exchange carrier, other than a rural telephone company, operating area or service area means such carrier's local exchange service area or areas as approved by the commission.

Thus, a carrier must offer its services throughout a rural telephone company's entire study area, unless this Commission and the Federal Communications Commission (FCC) approve a different service area. Wire centers are the service area currently designated by the Commission for universal service support for areas served by non-rural telephone companies.<sup>2</sup> A company may request redefinition of a service area if it cannot provide service throughout the entire service area using its own facilities or through resale. RCC has requested redefinition of some service areas.

### III. RCC'S ABILITY TO MEET FEDERAL ETC REQUIREMENTS

#### A. Services or Functionalities

9. In its Petition for ETC Designation,<sup>3</sup> RCC indicates that it will provide service using its own facilities that include wireless antennas, towers and mobile switching offices.<sup>4</sup>

<sup>&</sup>lt;sup>2</sup> In the Matter of an Investigation Into the Kansas Universal Service Fund (KUSF) Mechanism for the Purpose of Modifying the KUSF and Establishing a Cost-Based Fund, Docket No. 99-GIMT-326-GIT, Order No. 10, issued September 30, 1999, ¶56.

<sup>&</sup>lt;sup>3</sup> Verified Petition of RCC Minnesota, Inc. for Designation as an Eligible Telecommunications Carrier (Petition for ETC Designation), October 10, 2003.

<sup>&</sup>lt;sup>4</sup> *Id.* at ¶14.

RCC indicates that the company is a common carrier licensed by the FCC as the "A" side provider of cellular telecommunications services in several Rural Service Areas (RSAs).<sup>5</sup>

- 10. Based on the Federal-State Joint Board recommendations under Section 254(c), the FCC has defined "universal service" in 47 C.F.R. §54.101(a). "Universal service" is defined as including the following services or functionalities: (1) voice-grade access to the public switched network; (2) local usage; (3) dual-tone multi-frequency (DTMF); (4) single-party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange services; (8) access to directory assistance; and (9) toll limitation for qualifying low-income consumers. Based on Section 214(e)(1)(A) of the Federal Act and 47 C.F.R. §54.201(d)(1), a carrier must provide these services or functionalities to receive designation as an ETC, which then makes the carrier eligible to receive FUSF. Each service or functionality is discussed more fully below.
- 11. 47 C.F.R. §54.101(a)(1) provides that voice grade access to the public switched network is a universal service that should be supported through the Federal universal service mechanism. Therefore, RCC must provide this service in order to be designated as an ETC. RCC states it meets this requirement by providing voice-grade access to the public switched network. All customers of RCC are able to make and receive calls with a bandwidth of approximately 2700 Hertz. The KCC finds RCC provides voice grade access to the public switched network and is in compliance with 47 C.F.R. §54.101(a)(1).

<sup>&</sup>lt;sup>5</sup> Id. at Exhibit E, ¶¶ 3 and 5.

<sup>&</sup>lt;sup>6</sup> Voice grade access is defined as a functionality that enables a user of telecommunications services to transmit voice communications, including signaling the network that the caller wishes to place a call, and to receive voice communications, including receiving a signal indicating there is an incoming call. Voice grade access shall occur, at a minimum, within the frequency range between 300 Hertz and 3,000 Hertz.

<sup>&</sup>lt;sup>7</sup> Gruis Direct, p. 2, lines 25-26.

- 47 C.F.R. §54.101(a)(2) provides that local usage shall be supported by Federal 12. universal service support. RCC states that it will comply with any and all minimum local usage requirements adopted by the FCC. RCC states that it will meet the local usage requirements by including substantial local usage in all of its rate plans. The FCC initiated a proceeding to identify a minimum amount of local usage required to be included in a universal service offering. 10 The FCC has not rendered a decision in that proceeding. When the FCC renders its decision, all ETCs will be required to comply with any minimum local usage requirements adopted by the FCC. In addition, the Fifth Circuit Court of Appeals determined that states may impose additional eligibility requirements on carriers otherwise eligible to receive Federal universal service support. 11 Therefore, if the KCC, independent of an FCC decision, later requires a minimum amount of local usage, all ETCs will be required to comply with any minimum local usage requirements. The KCC finds that RCC will offer local usage in compliance with current FCC requirements. The KCC concludes that RCC is in compliance with 47 C.F.R. §54.101(a)(2).
- 47 C.F.R. §54.101(a)(3) provides that dual tone multi-frequency (DTMF) 13. signaling or its functional equivalent shall be supported by FUSF. 12 RCC states that it currently uses out-of-band digital signaling and in-band multi-frequency signaling that is functionally

Petition for ETC Designation at Exhibit E, pp. 2-3. <sup>10</sup> In the Matter of Federal-State Joint Board on Universal Service, CC Docket 96-45, Report and Order, FCC 97-157 (May 8, 1997), ¶ 67 ("Universal Service Order); Universal Service Further Notice of Proposed

<sup>&</sup>lt;sup>8</sup> Local usage means that a carrier provides an amount of minutes of use of local exchange service, prescribed by the Federal Communications Commission (FCC), without a usage charge to end-users. 47 C.F.R. §54.101(a)(2).

Rulemaking, FCC 98-278 (October 26, 1998) ("NPRM").

11 Texas Office of Pub. Util. Counsel v. FCC, 183 F.3d 393, 418 (5th Cir. 1999).

12 Dual tone multi-frequency signaling is a method of signaling that facilitates the transportation of signaling through the network, shortening call set-up time. 47 C.F.R. §54.101(a)(3).

equivalent to DTMF signaling.<sup>13</sup> The KCC concludes that RCC is in compliance with 47 C.F.R. §54.101(a)(3).

- 47 C.F.R. §54.101(a)(4) provides that single-party service or its functional 14. equivalent shall be supported by FUSF.<sup>14</sup> RCC states that it meets this requirement by providing a dedicated path for the length of all customer calls. All of its "loops" are single party connections.<sup>15</sup> The KCC concludes that RCC is in compliance with 47 C.F.R. §54.101(a)(4).
- 47 C.F.R. §54.101(a)(5) provides that access to emergency services including 15. access to 911 and enhanced 911 shall be supported by FUSF. 16 RCC states that it currently provides all of its customers with access to emergency service by dialing 911 in satisfaction of this requirement. The FCC has stated that wireless companies are not required to provide all of the E911 services until a local emergency service provider makes arrangements for the delivery of ALI and ANI from carriers and establishes a cost recovery mechanism. 18 RCC indicates that it has not yet received either a Phase I or a Phase II request for E911 services from a Kansas local emergency service provider, and RCC does not know whether any PSAP has established a cost recovery system. The KCC finds that RCC provides access to emergency services as currently defined by the FCC rules. The KCC concludes RCC is in compliance with 47 C.F.R.

<sup>&</sup>lt;sup>13</sup> Gruis Direct, p. 3, lines 8-9.

<sup>&</sup>lt;sup>14</sup> Single-party service is telecommunications service that permits users to have exclusive use of a wireline subscriber loop or access line for each call placed, or, in the case of wireless telecommunications carriers, which use spectrum shared among users to provide service, a dedicated message path for the length of a user's particular transmission.

<sup>&</sup>lt;sup>15</sup> Gruis Direct, p. 3, lines 13-14.

<sup>&</sup>lt;sup>16</sup> Access to emergency services includes access to 911 and enhanced 911 (E911) services provided by local governments or other public safety organizations. 911 is defined as a service that permits a telecommunications user, by dialing the three-digit code (911), to call emergency services through a Public Service Access Point (PSAP) operated by the local government. E911 is defined as 911 service that includes the ability to provide automatic numbering information (ANI), which enables the PSAP to call back if the call is disconnected, and automatic location information (ALI), which permits emergency service providers to identify the geographic location of the calling party. Access to emergency services includes access to 911 and E911 service to the extent the local government in an eligible carrier's service area has implemented 911 or E911 systems. 47 C.F.R. §54.101(a)(5).

17 Petition for ETC Designation at Exhibit E, p. 4.

<sup>&</sup>lt;sup>18</sup> Universal Service Order at ¶73.

- §54.101(a)(5). RCC will be required to provide all of the E911 services when a local emergency service provider makes arrangements for the delivery of ALI and ANI from carriers.
- 16. 47 C.F.R. §54.101(a)(6) provides that access to operator services shall be supported by FUSF. <sup>19</sup> RCC states that it meets this requirement by providing all of its customers with access to operator services provided by either the company or other entities [e.g., local exchange carriers (LECs), interexchange carriers (IXCs), etc.] by dialing "0". <sup>20</sup> The KCC finds that RCC provides access to operator services. The KCC concludes that RCC is in compliance with 47 C.F.R. §54.101(a)(6).
- 17. 47 C.F.R. §54.101(a)(7) provides that access to interexchange services shall be supported by FUSF.<sup>21</sup> RCC states that it currently meets this requirement by providing all of its customers with the ability to make and receive interexchange or toll calls through direct interconnection arrangements the company has with several IXCs. Additionally, customers are able to reach their IXC of choice by dialing the appropriate access code.<sup>22</sup> The KCC finds that RCC provides access to interexchange service. The KCC concludes that RCC is in compliance with 47 C.F.R. §54.101(a)(7).
- 18. 47 C.F.R. §54.101(a)(8) provides that access to directory assistance shall be supported by FUSF.<sup>23</sup> RCC states that it meets this requirement by providing all of its customers with access to directory assistance by dialing "411" or "555-1212."<sup>24</sup> The KCC finds that RCC

<sup>20</sup> Petition for ETC Designation at Exhibit E, p. 4.

<sup>22</sup> Petition for ETC Designation at Exhibit E, p. 4.

<sup>24</sup> Petition for ETC Designation at Exhibit E, p. 4.

<sup>&</sup>lt;sup>19</sup> Access to operator services is defined as access to any automatic or live assistance to a consumer to arrange for billing or completion, or both, of a telephone call. 47 C.F.R. §54.101(a)(6).

<sup>&</sup>lt;sup>21</sup> Access to interexchange service is defined as the use of the loop, as well as that portion of the switch that is paid for by the end user, or the functional equivalent of these network elements in the case of a wireless carrier, necessary to access an interexchange carrier's network. 47 C.F.R. §54.101(a)(7).

<sup>&</sup>lt;sup>23</sup>Access to directory assistance is defined as access to a service that includes, but is not limited to, making available to customers, upon request, information contained in directory listings. 47 C.F.R. §54.101(a)(8).

provides access to directory assistance. The KCC concludes that RCC is in compliance with 47 C.F.R. §54.101(a)(8).

- 19. 47 C.F.R. §54.101(a)(9) provides that toll limitation for qualifying low-income consumers shall be supported by FUSF.<sup>25</sup> An ETC must offer either "toll control"<sup>26</sup> or "toll blocking"<sup>27</sup> services to qualifying Lifeline customers at no additional charge. RCC states that it currently has no Lifeline customers because only carriers designated as ETCs can participate in the Federal Lifeline program. Once designated as an ETC, RCC will participate in Lifeline as required, and will provide toll blocking capability to its Lifeline customers, at no charge, as part of its universal service offerings.<sup>28</sup> If the Commission subsequently requires per minute blocking for Lifeline customers, RCC will be required to comply. Until such time, the Commission concludes that RCC is in compliance with 47 C.F.R. §54.101(a)(9).
- 20. The KCC concludes that RCC is in compliance with 47 C.F.R. §54.201(d)(1) because it offers each of the services or functions supported by Federal universal service support mechanisms in 47 C.F.R. § 54.101(a).
- B. Provision of Service Throughout the Service Area
- 21. RCC indicates that the company will offer service throughout the service areas in which it is designated as an ETC using its own facilities.<sup>29</sup> However, the Direct Testimony of RCC witness Gruis indicates that RCC has developed a six-step process it intends to use to

<sup>&</sup>lt;sup>25</sup>Toll limitation is denoted by either toll blocking or toll control for eligible telecommunications carriers that are incapable of providing both services. For eligible telecommunications carriers that are capable of providing both services, toll limitation denotes both toll blocking and toll control.

<sup>&</sup>lt;sup>26</sup> "Toll control" is a service provided by carriers that allows consumers to specify a certain amount of toll usage that may be incurred on their telecommunications channel per month or per billing cycle. 47 C.F.R. \$54.400(c).

<sup>§54.400(</sup>c).

27 "Toll blocking" is a service provided by carriers that lets consumers elect to not allow the completion of outgoing toll calls from their telecommunications channel. 47 C.F.R. §54.400(b).

<sup>&</sup>lt;sup>28</sup> Petition for ETC Designation at Exhibit E, p. 5.

<sup>&</sup>lt;sup>29</sup> Id. at ¶14.

evaluate whether it can commit to serving a remotely located customer. Staff expressed concern regarding RCC's commitment to serving customers throughout the designated service area. Specifically, Staff questioned the reasonableness of the fifth step in which RCC indicates that it will "explore" the possibility of using resale to meet its ETC obligations. Staff recommended that RCC be required to file reports with the Commission detailing the geographic area covered by RCC's current infrastructure in service areas where it is designated as an ETC, detailing the manner in which it will provide service in areas its current infrastructure does not serve, detailing the ability of a resold service of a wireless carrier to meet the Federal ETC requirements and detailing its plan, if any, to utilize the resold services of an ILEC. ITG shared this concern, suggesting that: "RCC offers nothing to insure that customers will, in fact, be provided service upon request, and nothing to demonstrate that it is, or will be, able to provide the supported services through the designated service area within a reasonable time."

22. RCC does not believe the company must respond to all requests for service.<sup>35</sup> The company believes its six-step process is sufficient to address all "reasonable" requests for service.<sup>36</sup> With regard to the fifth step that addresses the potential use of resale, RCC witness Kohler, at the hearing, did acknowledge that the company does not have resale arrangements currently in place with ILECs and that negotiating those arrangements might take considerable time.<sup>37</sup> RCC argues that Staff's suggestion that it provide specific service coverage information, including specific street addresses, is unreasonable and a barrier to entry in violation of Section

<sup>&</sup>lt;sup>30</sup> Gruis Direct, p. 8, line 5 through p. 9, line 20.

Aarnes Direct, p. 12, line 1 through p. 16, line 9.

<sup>32</sup> Staff Initial Brief at ¶9.

<sup>&</sup>lt;sup>33</sup> Aarnes Direct, p. 15, line 12 through p. 16, line 9.

<sup>&</sup>lt;sup>34</sup> Cooper Cross Answering, p. 19, line 16.

<sup>35</sup> RCC Initial Brief at ¶12.

<sup>&</sup>lt;sup>36</sup> Kohler Surrebuttal, p. 2, line 20 through p. 3, line 18.

<sup>&</sup>lt;sup>37</sup> T. Vol. I at 80, lines 16-23.

253(a) of the Federal Act.<sup>38</sup> Additionally, RCC states that such a requirement would violate Section 253(b) of the Federal Act by imposing a requirement on RCC that is not competitively neutral.<sup>39</sup> RCC states that such an onerous requirement would deter carriers from seeking ETC status and delay deployment of facilities to rural areas.<sup>40</sup> RCC also claims that demonstration of actual coverage, down to the street level, does not improve communications opportunities for rural customers or advance universal service. 41

23. Section 214(e)(1)(A) requires an ETC to provide the services for which Federal support is made available "throughout the service area for which the designation is received." The language is clear. The Commission has concerns with RCC's commitment to provide service throughout the designated service area. Therefore, the Commission will place two requirements on RCC. The Commission believes it has jurisdiction to place requirements on an ETC consistent with the Fifth Circuit Court of Appeals decision which determined that states may impose additional eligibility requirements on carriers otherwise eligible to receive FUSF.<sup>42</sup> First, the Commission requires RCC to file a map, within 60 days of the effective date of this order, indicating the extent of its existing infrastructure and the approximate geographic area for which service coverage is available from such facilities. Specifically, the Commission requires RCC to indicate the location of cell towers by section, township, range and distance from the quarter section lines. RCC should also indicate the radius for which reception is available using a conventional hand-held phone and for a more powerful phone such as a bag phone. Thereafter, the map should be updated on a yearly basis and provided to the Commission by December 31 of each year. The Commission does not believe this requirement is unreasonable or in violation of

<sup>&</sup>lt;sup>38</sup> RCC Reply Brief at ¶18. <sup>39</sup> RCC Reply Brief at ¶19.

<sup>42</sup> Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393, 418 (5th Cir. 1999).

Section 253(a). This is a type of business record that the company can reasonably be expected to possess and maintain for its own business purposes. This cannot be reasonably construed as a barrier to entry. Rather, it is a reasonable means for the Commission to determine where coverage is available for a requesting customer and monitor RCC's progress toward meeting the requests of customers for service. Imposition of this requirement does not mean the Commission believes that RCC must have the immediate ability to serve every customer in the service areas where it receives ETC designation. The Commission is cognizant that it will take time for RCC to expand its network. This requirement should not be viewed as a Commission requirement to replicate wireline service. 43 While the Commission believes that one of the purposes of designating additional ETCs is to provide consumers who might not otherwise have competitive alternatives with competitive choices, this does not mean that one competitive ETC must replicate the entire wireline network. However, the ETC must be willing to provide service throughout the service area for which it is designated an ETC with either its own facilities or through resale. Again, the map is an aid for the Commission to use in evaluating the progress made by RCC in meeting this requirement. Contrary to RCC's assertion, the requirement is competitively neutral. Currently, any public utility owning or operating one or more telecommunication supply lines must file annually a map or maps showing routes of all existing telecommunications supply lines. K.A.R. 82-12-7(b). Additionally, RCC is required to report all instances in which the company refuses to serve a customer, after following its six-step process, on a quarterly basis (January 1, April 1, July 1 and October 1). RCC will be required to provide information regarding the specific location of the customer (street address), the company's rationale for reaching the sixth step of the process for a customer and the company's progress with establishing interconnection arrangements which permit resale of either wireless or

<sup>&</sup>lt;sup>43</sup> RCC Reply Brief at ¶22.

ILEC services in the location of the customer the company refused to serve. As Ms. Kohler acknowledged at the hearing, the Commission should determine whether a request for service is reasonable.44 This information will aid the Commission in that determination. The Commission also believes that the advertising requirement it will impose later in this Order will serve to create customer awareness of RCC's obligation to serve. Customers will then be able to file complaints with the Commission if they choose. The information will also assist the Commission in determining the reasonableness of any such complaints.

#### C. Advertising

- 24. RCC indicates that upon designation as an ETC, it shall advertise the availability of its service offerings throughout the proposed service area. The methods of advertising utilized may include newspaper, magazine, direct mailings, public exhibits and displays, bill inserts and telephone directory advertising. RCC states it will use the same media of general distribution to advertise its universal service offerings and charges and will comply with any advertising requirement adopted by the KCC or the FCC. 45
- Staff recommended the Commission further examine the imposition of more 25. specific advertising requirements on all ETCs. Staff suggested that advertising emphasize an ETC's universal service obligation including the offering of service to all consumers in the service area. 46 While Staff did not specifically recommend placing this requirement on RCC in this docket, the Commission believes it is a reasonable requirement to impose at this time. Again, the Fifth Circuit Court of Appeals determined that states may impose additional eligibility requirements on carriers otherwise eligible to receive Federal universal service support. The Commission directs Staff and RCC to develop language to be used in all advertising for areas in

T. Vol. I at 80.
 Petition for ETC Designation at ¶24.
 Aarnes Cross Answering, p. 7, lines 18-20 through p. 8, lines 12-16.

which RCC is designated as an ETC. The language developed should include information directing customers to the Commission's Office of Public Affairs and Consumer Protection for complaints regarding any service issues. Staff and RCC shall file a status report with the Commission within 90 days of the effective date of this order informing the Commission of progress in meeting this requirement.

#### IV. DESIGNATION OF RCC AS AN ETC IN NON-RURAL SERVICE AREAS

26. The Federal Act, at Section 214(e)(2), states that:

Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirement of paragraph (1). (Emphasis added.)

The language of the Federal Act states that a commission "shall" designate additional ETCs in non-rural service areas if the applicant will provide the required services. The Commission has concluded that RCC is capable of providing the nine supported services and will advertise the availability of its service throughout the designated service area. In prior cases, the Commission has interpreted the use of the word "shall" as leaving the Commission no discretion in designating an ETC in non-rural areas if all supported services were offered and advertised throughout the service area. However, the FCC has indicated in the *Virginia Cellular* proceeding that a public interest finding must also be made. <sup>47</sup> Below, the Commission will address the public interest analysis for RCC's designation as an ETC in rural areas. As will be detailed below, the Commission finds it is in the public interest to designate RCC as an additional ETC in rural areas so long as it meets the additional requirements imposed by this Order. Thus, the

<sup>&</sup>lt;sup>47</sup> In the Matter of Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier In the Commonwealth of Virginia, CC Docket No. 96-45, Memorandum Opinion and Order (rel. January 22, 2004) ("Virginia Cellular Order"), ¶27.

Commission finds that RCC satisfies the requirements to be designated as an ETC in the non-rural service areas as designated by this Commission and it is in the public interest to designate RCC as an ETC in non-rural areas so long as it agrees to the additional requirements imposed by this Order.

- 27. The only non-rural service areas at issue in this proceeding are the service areas of SWBT. Currently, non-rural service areas are defined by this Commission as the wire centers served by non-rural ILECs. In its Petition for ETC Designation, RCC states that for non-rural ILECs, it "requests ETC designation in that portion of the wire center where it does provide service." RCC acknowledged that in non-rural areas the Commission can "define service areas as it sees fit" and "may establish an ETC service area for a competitor without Federal concurrence." However, in RCC's Initial Brief, the company seems to imply that the Commission must accept its proposal to have a service area defined by its operating footprint. RCC states that it "is not aware of an FCC or state case that places the rural telephone protections, contained in Section 214 of the Act or Section 54.207 of the FCC's rules, on carriers serving non-rural areas." 50
- 28. Section 214(e)(5) of the Federal Act defines "service area" as "a geographic area established by a State commission for the purpose of determining universal service obligations and support mechanisms." (Emphasis added.) The Commission has previously determined that non-rural service areas are to be the wire centers in the service territories of non-rural ILECs. Federal support is provided to non-rural ILECs on a wire center basis. Contrary to RCC's position in its Initial Brief, the Commission does need to make a determination regarding whether to define a new geographic area as a service area in territory served by SWBT. The

<sup>&</sup>lt;sup>48</sup> Petition for ETC Designation at ¶8.

<sup>&</sup>lt;sup>49</sup> Petition for ETC Designation at ¶8.

<sup>&</sup>lt;sup>50</sup> RCC Initial Brief at ¶53.

Commission declines to adopt a new definition of service area at this time. As Staff has stated, the FCC determined that when redefining a service area, the new definition will apply to all future ETCs.<sup>51</sup> The Commission believes the FCC's interpretation of the applicability of service area definitions to future ETC applicants is reasonable. Thus, the Commission finds that it shall retain wire centers as the service area for areas served by non-rural ILECs. The Commission agrees with RCC's position that rural protections need not be extended to non-rural carriers. Therefore, the Commission will not impose the customer density analysis advocated by the FCC for determination of whether a carrier will be designated as an ETC for a particular wire center. To the extent that RCC is capable of providing service throughout an entire SWBT wire center and meets the requirements imposed in this Order, it shall be designated as an ETC in a particular SWBT wire center. Testimony by Staff states there are 27 SWBT wire centers that coincide with RCC's operating footprint.<sup>52</sup> The Commission has found Staff's mapping process to be accurate and reliable. Attachment A sets out the SWBT wire centers in which the Commission designates RCC as an ETC, if the company agrees to the additional requirements imposed in this Order.

#### V. PUBLIC INTEREST ANALYSIS

29. As indicated previously, for service areas of rural companies, the Commission must make a finding that designation of an additional ETC is in the public interest. The Commission, in Docket No. 99-GCCZ-156-ETC, established a rebuttable presumption that it is in the public interest to designate additional ETCs in the areas served by rural telephone companies. In its May 19, 2000 Order issued in Docket No. 99-GCCZ-156-ETC, the Commission stated the following:

Aarnes Cross Answering, p. 32, lines 10-26.
 Aarnes Direct, p. 16, line 20.

The Commission must be guided by K.S.A. 1999 Supp. 66-2001 when making determinations that affect telecommunications customers in Kansas. The clear and unmistakable public policy imperative from both the federal and state legislatures is that competition is a goal, even in rural areas. Arguments have been made that competition is not in the public interest in any rural telephone company service area because it may jeopardize universal service. However, there had been no basis presented for reaching the broad conclusion that competition and universal service are never able to exist together in rural areas. The Commission does not accept the assertion that designating additional ETCs in rural areas will necessarily threaten universal service. The benefits of competition and customer choice are available to Kansans living in non-rural areas. General concerns and speculation are not sufficient justification for adopting a policy that would result in benefits and services that are available to other Kansans not also being available to rural telephone customers. The Commission finds, as a general principle, that allowing additional ETCs to be designated in rural telephone company service areas is in the public interest.

This general public interest finding is a presumption which may be rebutted by individual rural telephone companies. The Commission has the discretion to find that in a particular discrete rural area, competition is not in the public interest. The obligation to establish that additional ETCs are not in the public interest is on the rural telephone company serving that area. Such a determination must be based on the facts shown to exist in a specific study area. <sup>53</sup> (Emphasis added.)

30. In its direct testimony, Staff indicated its belief that the Commission had made this decision as a generic policy statement to be applicable to all applications for ETC designation.<sup>54</sup> Staff stated that, as a general presumption, designation of additional ETCs in rural areas is in the public interest but added that the companies affected by the applications should be given an opportunity to rebut that notion.<sup>55</sup> In cross-answering testimony, Staff stated that the FCC had recently found that considering only the value of competition is not sufficient in making a public interest finding.<sup>56</sup> While noting that the Commission is not bound by the FCC's

<sup>&</sup>lt;sup>53</sup> In the Matter of GCC License Corporation's Petition for Designation as an Eligible Telecommunications Carrier, Docket No. 99-GCCZ-156-ETC, May 19, 2000 Order, pp. 3-4 ("Western Wireless Order").

<sup>&</sup>lt;sup>54</sup> Aarnes Direct, p. 35, line 31.

<sup>&</sup>lt;sup>55</sup> *Id.* at p. 36, lines 1-9.

<sup>&</sup>lt;sup>56</sup> Aarnes Cross-Answering, p. 3, lines 25-27.

determination (discussed later), Staff provided an analysis consistent with the FCC's recommendations.<sup>57</sup>

- 31. SIA argued in its rebuttal testimony that the Commission has not established specific criteria for evaluating the public interest. SIA witness Barron suggested that the Commission wait for the Federal-State Joint Board to issue its recommendations regarding ETC designations and for the FCC to adopt such recommendations.<sup>58</sup> Alternatively, Mr. Barron suggested that the Commission evaluate the public interest as outlined by the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO).<sup>59</sup> Mr. Barron suggests that the following be considered:
  - •whether consumers will receive access to affordable and quality services, including advanced services;
  - •whether the universal service support will be used to incent uneconomic entry;
  - •the impact on the universal service fund;
  - •whether the benefits of competition outweigh the cost of supporting multiple networks; and,
  - •the potential for and the impact of market failure. 60

Mr. Barron then concentrates his testimony on a cost-benefit analysis. Relying on the testimony of ITG witness Cooper, Mr. Barron concludes that there are no new benefits available to consumers through the designation of RCC as an ETC.<sup>61</sup> Mr. Barron suggests that the costs associated with designating RCC as an ETC can be seen through increases in the total Federal universal support program which leads to higher assessments on consumer bills and the decline

<sup>&</sup>lt;sup>57</sup> *Id.* at p. 26, line 6 through p. 31, line26.

<sup>58</sup> Barron Rebuttal, p. 4, line 19 through p. 5, line 10.

<sup>&</sup>lt;sup>59</sup> *Id.* at p. 11, line 26 through p. 12, line 23.

<sup>60</sup> *ld*. at p. 12, lines 4-19.

<sup>61</sup> Id. at p. 14, lines 5-6.

in political support for such support programs. 62 Both of these are believed to lead to higher rates for consumers. Mr. Barron also provides an estimate of the impact on the Federal fund if all wireless companies, not just RCC, in the rural service areas in question were provided with support. 63 SIA concludes that it is not in the public interest to designate RCC as an ETC in rural service areas. SIA did not address the FCC's decision in its Virginia Cellular Order.

- ITG also argued that designation of RCC as an ETC is not in the public interest.<sup>64</sup> 32. Through its witness, Mr. Paul Cooper, ITG suggests that RCC is already providing service and thus the benefits RCC's service brings to the market are already available. 65 Mr. Cooper suggests several other reasons that designation of RCC as an ETC in rural service areas is not in the public interest. Mr. Cooper asserts that it is not in the public interest to designate RCC as an ETC because: RCC does not have a cost based need for Federal support, RCC's rates are not affordable and do not include a reasonable amount of local usage, RCC has not shown that its service is reliable, RCC's expanded calling scopes are not supported services and RCC is not willing to commit to provide service to requesting customers within a reasonable time period.<sup>66</sup> In cross-answering testimony, Mr. Cooper addresses the FCC's public interest examination enumerated in the Virginia Cellular Order. Mr. Cooper concluded that RCC had not demonstrated that those criteria would be met.<sup>67</sup>
- RCC suggests that designating the company as an ETC in rural service areas is in 33. the public interest. RCC witnesses Kohler and Wood address the public interest issue. RCC claims that consumers will have additional choices for equipment, modes of service, calling

 <sup>62</sup> Id. at p. 15, lines 11-15.
 63 Id. at Attachment CSB-2.

<sup>&</sup>lt;sup>64</sup> Cooper Rebuttal, p. 3, lines 13-14.

<sup>&</sup>lt;sup>65</sup> *Id.* at p. 3, lines 15-19 and p. 9, line 10 through p. 11, line 5. <sup>66</sup> *Id.* at p. 4, lines 1-13 and p. 13 line 9 through page 19, line 17. <sup>67</sup> Cooper Cross Answering, p. 15, line 12 through p. 20, line 21.

plans and carriers.<sup>68</sup> In addition to the broader service plans and equipment options, consumers will eventually benefit from carriers becoming more efficient and responsive to their service needs.<sup>69</sup> Mr. Wood believes that competitive entry is also necessary to promote economic development in rural areas and to address rural health and safety.<sup>70</sup> Regarding the FCC's *Virginia Cellular* Order, RCC does not believe the Commission is bound by the FCC's order.<sup>71</sup> Additionally, Ms. Kohler advises the Commission that RCC believes the FCC has unlawfully shifted the burden of proof to the petitioner.<sup>72</sup> Finally, Ms. Kohler suggests that because the *Virginia Cellular* decision is under reconsideration and may be modified, the Commission should not apply this new analysis.<sup>73</sup> However, if applied, RCC believes it meets the public interest test introduced in the *Virginia Cellular* Order.<sup>74</sup>

34. As mentioned above, during the course of this proceeding, the FCC adopted other considerations in evaluating public interest findings for rural company service areas in its *Virginia Cellular* Order. In that order, the FCC states:

We conclude that the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas. Instead, in determining whether designation of a competitive ETC in a rural telephone company's service area is in the public interest, we weigh numerous factors, including the benefits of increased competitive choice, the impact of multiple designations on the universal service fund, the unique advantages and disadvantages of the competitor's service offering, any commitments made regarding quality of telephone service provided by competing providers, and the competitive ETC's ability to provide the supported services throughout the designated service area within a reasonable time frame.<sup>75</sup>

<sup>&</sup>lt;sup>68</sup> Kohler Direct, p. 4, line 4 through p. 6, line 2.

<sup>&</sup>lt;sup>69</sup> Wood Direct, p. 5, line14 through p. 6, line 7.

<sup>&</sup>lt;sup>70</sup> *Id.* at p. 7, line 10 through p. 8, line 11.

<sup>&</sup>lt;sup>71</sup> Kohler Surrebuttal, p. 12, lines 14-17.

<sup>&</sup>lt;sup>72</sup> Id. at p. 12, lines 21-23.

<sup>&</sup>lt;sup>73</sup> *Id.* at p. 13, lines 1-7.

<sup>&</sup>lt;sup>74</sup> Id. at p. 15, line 21 through p. 17, line 9.

<sup>75</sup> Virginia Cellular Order at ¶4.

While the FCC's Virginia Cellular decision is not binding on this Commission, the Commission finds that examination of the additional factors enumerated in the FCC's order is reasonable despite the concerns expressed by RCC. Because the designation at issue in this proceeding is for designation as an ETC for access only to FUSF support, the Commission believes following the FCC's lead in this matter is the prudent and appropriate course. Although SIA suggests that the Commission review the public interest through a cost-benefit analysis and ITG suggests other factors for consideration, at this time, the Commission will adopt the analytical framework outlined by the FCC. To the extent the FCC's public interest test incorporates the concerns of SIA and ITG, those issues will be addressed.

#### Benefits of Increased Competitive Choice A.

- 35. On behalf of RCC, Ms. Kohler argues that the benefits of increased customer choice are lower prices and new, improved services from both the competitor and the ILEC. 76 Staff states that one benefit associated with RCC providing new customer service options, aside from those already noted, will be the contribution of new telecommunications infrastructure in the state.<sup>77</sup> ITG suggests that the services are already being offered, without ETC designation, thus no new benefits will accrue. 78 SIA did not provide specific testimony regarding the Virginia Cellular Order.
- 36. The Commission concludes that the evidence presented supports a finding that designation of RCC as an ETC in rural service areas will provide benefits flowing from increased customer choice. The motive for moving toward a competitive telecommunications market has been supported by the economic argument that competitive alternatives will result in customers making choices among service providers which will ultimately lead to lower prices

Kohler Surrebuttal, p. 16, lines 9-12.
 Aarnes Cross Answering, p. 26, lines 20-21.
 Cooper Cross Answering, p. 15, lines 17-22.

and better service for consumers. Nothing in this proceeding persuades the Commission that these general arguments are invalid in the service areas in which ETC designation is requested. Specific testimony has been provided by RCC that it will expand and improve its network leading to additional competitive options in the state. While ITG and SIA point out that RCC is already offering some service options in some rural areas of the state, RCC will be able to expand its service offerings to other rural areas if designated as an ETC. The direct testimony of RCC witness Kohler states that the company will build additional facilities, increase the number of areas in which RCC can provide service, improve service in areas it currently serves and provide new service enhancements.<sup>79</sup> The Commission believes that this improvement and expansion of the existing network will bring new competitive benefits to both RCC's current customers and those that will be able to utilize RCC's service for the first time. The Commission also concludes that the requirement imposed on RCC to provide the Commission with coverage maps will assist the Commission in monitoring the expansion of coverage to new areas of the state.

- Impact of Multiple Designations on the Universal Service Fund В.
- 37. Staff witness Aarnes testified that based on projections RCC provided the Universal Service Administrative Company (USAC), RCC will be eligible to receive \$591,000 in high-cost support for the second quarter of 2004.80 Ms. Aarnes states that this is approximately .07 percent of all high-cost support paid through the fund. 81 RCC states that, according to USAC's projections at the time, the company would be eligible for approximately \$3.1 million in high-cost support during its first year of eligibility or approximately 0.1 percent

<sup>Kohler Direct, p. 3 line 17 through p. 6, line 2.
Aarnes Cross Answering, p. 28, line 1.
Id. at p. 28, line 2.</sup> 

of all high-cost support paid through the fund. 82 ITG argues that RCC has not established a costbased need for support and therefore it must be presumed that the designation of RCC as an ETC will have a negative impact on the fund. 83 SIA indicates that if every wireless subscriber, regardless of whether the customer is served by RCC, receives support, the fund would increase by \$31 million.84

- 38. The Virginia Cellular Order does not require a competitive ETC to prove that it has a cost-based need for support. Further, since at this time the FCC ports the ILEC's per-line support to competitive ETCs, it seems unlikely that the FCC intends for need to be considered in conjunction with this public interest criterion. Thus, the Commission does not believe ITG's comments are relevant in this instance. The calculation provided by SIA is not consistent with the requirements of the Virginia Cellular Order. The Commission acknowledges that SIA did not have knowledge of the Virginia Cellular Order when Mr. Barron filed his rebuttal testimony. Nonetheless, the Commission must address Mr. Barron's calculation in light of that decision. The FCC now indicates that it will consider the impact of the particular ETC applicant receiving funds not the impact of all potential ETC applicants. Unfortunately, the Virginia Cellular Order does not provide a specific level of impact on the Federal fund the FCC would consider to be substantial enough to warrant denial of an ETC designation. The Commission concludes that the estimated impact on the fund, that is, approximately 0.1 percent, is unlikely to be viewed as significant.
- C. Unique Advantages and Disadvantages of the Competitor's Service
- 39. RCC argues that some unique advantages to its service offerings are mobility, large local calling areas and the ability to choose among service plans with varied usage

Kohler Surrebuttal, p. 17, line 22 through p. 18, line 4; RCC Initial Brief at ¶39.
 Cooper Cross Answering, p. 16, lines 8-10.
 Barron Rebuttal, p. 19, lines 1-7.

amounts. 85 Staff echoes these advantages and acknowledges that RCC's wireless offering may also carry with it some disadvantages. Staff notes that some parties claim that wireless services are provided at a lower level of service quality than landline service. 86 However, Staff suggests that universal service support could be used to improve service quality and that if the Commission is concerned with service quality, it could develop service standards to be imposed on all ETCs. 87 Staff pointed out that the existence of "dead spots" is acknowledged by FCC rules and therefore cannot be used as evidence that a company is unwilling or incapable of providing acceptable service. 88 ITG suggests that the Commission must carefully examine the number of minutes included in a plan before attributing RCC's service offering with a larger calling scope. If the plan does not contain a sufficient number of minutes, the customer may end up paying for additional minutes whether they are for local or toll calls. 89 ITG claims that the additional costs could render the offerings "unaffordable" as compared to current target local residential rates set by statute.<sup>90</sup> ITG suggests that the Commission should deem specific rate plans as eligible for universal service fund support. 91 RCC responded that affordability of service is presumed in competitive markets, 92 and that "the FCC has confirmed on numerous occasions that a competitive ETC receives support on all lines, irrespective of how much a customer pays for service."93

40. The Commission finds that RCC's service offerings do offer unique advantages such as mobility and larger calling scopes. The Commission tempers its finding with the

<sup>85</sup> Kohler Surrebuttal, p. 16, lines 14-17.

<sup>&</sup>lt;sup>86</sup> Aarnes Cross Answering, p. 28, lines 13-18.

<sup>&</sup>lt;sup>87</sup> Id. at p. 28, line 21 through p. 29, line 2.

<sup>88</sup> Id. at p. 29, lines 4-28.

<sup>&</sup>lt;sup>89</sup> Cooper Cross Answering, p. 17, line 14 through p. 18, line 15.

<sup>90</sup> Cooper Rebuttal, p. 14, line 22.

<sup>&</sup>lt;sup>91</sup> Id. at pp. 16-17.

<sup>92</sup> RCC Initial Brief at ¶41.

<sup>&</sup>lt;sup>93</sup> *Id.* at ¶69.

understanding of local calling scopes offered by ITG. The Commission notes that in the *Virginia*Cellular Order, the FCC states:

... the mobility of Virginia Cellular's wireless will provide other benefits to consumers. For example, the mobility of telecommunications assists consumers in rural areas who often must drive significant distances to places of employment, stores, schools, and other critical community locations. In addition, the availability of a wireless universal service offering provides access to emergency services that can mitigate the unique risks of geographic isolation associated with living in rural communities.<sup>94</sup>

With regard to mobility, the Commission notes that an ETC is not limited to providing only the designated universal services and functionalities, only that the support must be used for its intended purpose. The Commission finds that the advantages of RCC's service are a greater benefit than any harm caused by disadvantages. Consumers are able to decide whether the advantages outweigh the disadvantages of RCC's service offerings. If the advantages are not great enough, consumers will not subscribe to the service and RCC will not receive support.

#### D. Service Quality Commitments

41. RCC witness Gruis states that the company makes every effort to provide reliable service. He reports that RCC's outage response time is usually less than one hour, that battery backups are installed at cell sites, generators are located at key communications sites and at the switch and all sites are monitored remotely by the switch. RCC claims to have a call completion rate of approximately 98 percent. RCC also states that customer service representatives are available 24 hours a day, seven days a week – toll and airtime-free. Additionally, RCC has committed to follow the Cellular Telecommunications Industry

<sup>94</sup> Virginia Cellular Order at ¶29.

<sup>95</sup> Gruis Direct, p. 5, line 16 through p. 6, line 6.

<sup>&</sup>lt;sup>96</sup> *Id.* at p. 6, line 17.

<sup>&</sup>lt;sup>97</sup> *Id.* at p. 6, lines 20-21.

Association (CTIA) customer code for wireless service. RCC will also report the number of consumer complaints per 1000 handsets each year. Staff states that it is not opposed to the imposition of quality of service standards for RCC and all other ETCs and suggests that the Commission open a generic proceeding to explore this issue. SIA states that RCC has not demonstrated a commitment to quality service.

- 42. The Commission finds that RCC has met the requirements set out in the *Virginia Cellular* Order by committing to comply with CTIA's Code for Wireless Service and to report the number of complaints per 1000 handsets each year. These are the same commitments accepted by the FCC. However, the Commission is interested in exploring additional quality of service standards in a generic proceeding.
- E. Ability to Provide the Supported Services Throughout Service Area Within a Reasonable Timeframe
- 43. RCC states that its six-step process for evaluating requests for service demonstrates its commitment to make service available. RCC commits to providing the Commission with a report regarding how it has used universal service support within the state to expand its network. Staff reiterated its concern with RCC's commitment to provide service throughout the service area. TG shares Staff's concern. However, in its Initial Brief, Staff found that the commitments made by RCC in its Additional Testimony and in the hearing demonstrate that RCC is willing to provide service within a reasonable amount of time.

<sup>98</sup> Kohler Additional, p. 7, lines 14-17.

<sup>&</sup>lt;sup>99</sup> Kohler Surrebuttal, p. 17, lines 3-4.

<sup>&</sup>lt;sup>100</sup> Aarnes Cross Answering, p. 31, lines 4-6.

<sup>101</sup> Cooper Cross Answering, p. 19, lines 3-4.

<sup>102</sup> Kohler Surrebuttal, p. 17, lines 6-9.

<sup>103</sup> Kohler Additional, p. 8, lines 5-16.

<sup>&</sup>lt;sup>104</sup> Aarnes Cross Answering, p. 31, lines 12-18.

<sup>&</sup>lt;sup>105</sup> Cooper Cross Answering, p. 19, lines 13-16.

<sup>106</sup> Staff Initial Brief at ¶23.

- 44. In paragraphs 7-18 of this Order, the Commission addressed RCC's ability to provide the supported services. The Commission concluded that RCC can or will be able to provide those services. In paragraphs 19-21 of this Order, the Commission addressed RCC's commitment to provide service throughout the designated service area. The Commission concluded that two reporting requirements would be placed on RCC. The Commission requires that maps be provided indicating where RCC has placed facilities and the approximate coverage area associated with those facilities. The Commission also requires RCC to report, quarterly, any denial of requests for service. The Commission believes these requirements will assist in the evaluation of RCC's progress with meeting its obligation to provide the supported services throughout the designated service areas within a reasonable timeframe. The Commission will address RCC's offer to provide evidence regarding its use of USF support in a later discussion regarding recertification.
- 45. The Commission concludes that it is in the public interest to designate RCC as an additional ETC in service areas of rural ILECs subject to the company's fulfillment of the additional requirements imposed by this Order and to the extent that the company's operating footprint coincides with the service area of a rural ILEC. Attachment B sets out those rural service areas which RCC's operating footprint covers without the need for redefinition.

  Redefinition will be discussed below.

#### VI. RURAL SERVICE AREA REDEFINITION

46. Section 214(e)(5) of the Federal Act defines "service area" as:

... a geographic area established by a State commission for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the [Federal Communications] Commission and the States, after taking into account recommendations of a

Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company.

- 47. In the case of a rural ILEC, the service area is the study area of the rural ILEC. RCC requests redefinition pursuant to C.F.R. §54.207(c). The regulation requires the state commission or other party seeking redefinition to file a petition with the FCC containing the new definition proposed by the state commission and the state's official ruling which presents the state commission's reasons for supporting redefinition. The FCC then issues a Public Notice within 14 days of receiving the petition. The FCC may initiate a proceeding to consider the petition within 90 days of releasing the Public Notice. If the FCC initiates a proceeding, the proposed redefinition does not take effect until both the state commission and the FCC come to agreement on the redefinition of the service area. If the FCC does not act on the petition within 90 days of the release of the Public Notice, the proposed redefinition will be deemed approved and may take effect.
- 48. In its Petition for ETC Designation, RCC states that for those rural service areas its operating footprint does not cover entirely, it requests that the service area be redefined consistent with the wire centers of the ILEC.<sup>107</sup> Further, to the extent that RCC's operating footprint does not entirely cover the wire center of a rural ILEC, the company requests that the Commission redefine the service area to that portion of a wire center covered.<sup>108</sup> However, notwithstanding RCC's testimony regarding its concerns with the FCC's analysis in the *Virginia Cellular* Order, <sup>109</sup> RCC witness Kohler states that if the Commission decides to follow the

<sup>&</sup>lt;sup>107</sup> Petition for ETC Designation at ¶36.

Id.

<sup>109</sup> Kohler Additional, p. 2, line 15 through p. 5, line 16.

Virginia Cellular Order, RCC is willing to accept designation as an ETC only for those rural wire centers that it is able to serve in their entirety. 110

- 49. Staff provided the Commission with several options for redefining the service areas of rural ILECs in the direct testimony of Staff witness Aarnes. Staff reviewed the Federal-State Joint Board recommendations regarding redefinition and presented its options giving consideration to the Board's concerns related to cream skimming and administrative burdens placed on rural ILECs by redefinition. Staff suggested the Commission may:
  - 1) decline to revise the rural telephone company service areas;
  - 2) redefine the service areas so that contiguous rural telephone company exchanges constitute a service area;
  - redefine the service areas so that each wire center is a service area; or 3)
  - 4) redefine the service areas and allow RCC to receive federal universal service support for any area that it covers, even if it is only a portion of a wire center.111

Following the release of the Virginia Cellular Order, Staff withdrew its fourth option because Staff believes that once a service area is redefined, that definition will apply to all future ETC designations in that service area. Staff directed the Commission to language in the Virginia Cellular Order that supports this belief. Specifically, the FCC states:

We define the affected service areas only to determine the portions of the rural service areas in which to designate Virginia Cellular and future competitive carriers seeking ETC designation in the same rural service areas. Any future competitive carrier seeking ETC designation in these redefined rural service areas will be required to demonstrate that such designation will be in the public interest. 112

Additionally, Staff provided testimony examining the population densities of each wire center for which redefinition had been requested as the FCC had done in the Virginia Cellular Order. 113

<sup>110</sup> *Id.* at p. 5, line 23 through p. 6, line 2.111 Aarnes Direct, p. 27, lines 13-18.

Virginia Cellular Order at ¶41.

<sup>&</sup>lt;sup>113</sup> Aarnes Cross Answering, p. 35, line 1 through p. 48, line 10; Aarnes Supplemental, p. 2, line 2 through p. 6, line 19.

- TTG argues that the Commission should deny RCC's request for redefinition.

  ITG witness Cooper reviewed the Federal-State Joint Board's recommendations regarding redefinition. He asserts that cream skimming is a serious concern in this instance. He asserts that cream skimming is a serious concern in this instance. Mr. Cooper believes that the ability of a rural ILEC to disaggregate FUSF support does not resolve the potential for cream skimming. Mr. Cooper also asserts that redefinition would place substantial administrative burdens on rural ILECs such as formulating a plan for disaggregation of support. Following the release of the *Virginia Cellular* Order, ITG maintained its position regarding the effects of cream skimming due to service area redefinition unless the Commission were to perform population density analysis as did the FCC. However, Mr. Cooper states that the Commission should not perform the density analysis thereby providing RCC with an incentive to serve the entire study area of a rural LEC. SIA did not provide testimony specifically addressing the redefinition issue.
- 51. While the FCC's Virginia Cellular decision is not binding on this Commission, the Commission finds that examination of the additional factors enumerated in the FCC's order is reasonable despite the concerns expressed by RCC. Because the designation at issue in this proceeding is for designation as an ETC for access only to FUSF support, the Commission believes following the FCC's lead in this matter is the prudent and appropriate course. The Commission finds that redefinition by wire center is in the public interest when the population density analysis introduced in the Virginia Cellular Order is utilized to make such a determination. Staff provided a population density analysis and made recommendations for redefinition based on that analysis. RCC did not provide such an analysis. Thus, the

<sup>114</sup> Cooper Rebuttal, p. 27, line 19 through p. 30, line 19.

<sup>115</sup> Id. at p. 29, line 1 through p. 30, line 19.

<sup>116</sup> Id. at p. 31, line 7-28.

<sup>117</sup> Cooper Cross Answering, p. 28, lines 3-14.

<sup>118</sup> Id. at p. 28, lines 15-18.

Commission will rely on Staff's population density analysis. Attachment C contains those service areas for which the Commission finds redefinition to the wire center to be in the public interest and for which RCC is designated as an ETC subject to meeting the additional requirements imposed by this Order.

#### VII. RECERTIFICATION PROCESS

52. Section 254(e) of the Federal Act provides that carriers receiving universal service support shall use the support "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." Each year, the Commission must provide certification to the FCC and USAC that ETCs use Federal support in the manner for which it was intended. The Commission also requires that the support be used only in those areas where the company is designated as an ETC. Currently, the certification consists of a verified statement filed by a company executive stating that the company will use the Federal support as intended. The self-certification is to be provided by a person who is in a position to direct the company's expenditures. The Commission, in turn, sends letters to the FCC and USAC certifying that the companies listed within the letter have submitted certification that support would be used as intended. Additionally, RCC witness Wood testified that competitive ETCs are audited by USAC. He stated that those audits are conducted to monitor both the proper reporting of lines in a service area and to determine whether the funds are properly used. 119 The frequency or probability of an audit was not clear, however.

<sup>&</sup>lt;sup>119</sup> T. Vol. II at 305-306.

53. Concern was expressed, during the hearing and in briefs about the Commission's ability to monitor and verify the use of USF support. 120 In their brief, SIA and ITG argue that the Commission must be able to:

... assure that all federal support received as a result of the requested designation is used for authorized purposes, [or] ratepayer funds become subsidies for costs and investment in areas unapproved for the applicant's receipt of USF support, or legally unsupported services and/or for increased shareholder dividends. 12 (Emphasis in the original.)

SIA and ITG do not believe that self-certification is sufficient for carriers that are not subjected to audits. 122 RCC states that the company commits to an initial build out plan using USF "for the purposes allowed by law." 123 RCC also responds that it has no objection to submitting documents to substantiate that it uses USF support for its intended purposes but suggests that all ETCs should be held to the same standard. 124 RCC witness Wood suggested that the Commission require ETCs to provide information, each year, regarding the use of funds. He indicated that states are becoming more aggressive in the annual certification process with both competitive ETCs and incumbents. 125

Since the filing of briefs in this proceeding, the Commission initiated a 54. proceeding to examine the certification process. That investigation will occur in Docket No. 05-GIMT-112-GIT. In that docket, the Commission intends to consider revising the certification process currently utilized by the Commission. In recent ETC hearings, parties to those proceedings raised numerous concerns with respect to the Commission's self-certification process. In addition, the Federal-State Joint Board on Universal Service issued a Recommended

<sup>&</sup>lt;sup>120</sup> T. Vol. I at 36-39, 50-51, 123-127, 136-137, 161-165; T. Vol. II at 247-250, 269-273, 286-287, 297-300, 305-307, 314-316, 319-321, 334-335, 338-340, 465-475; SIA/ITG Initial and Reply Briefs.

121 SIA/ITG Initial Brief at 4.

<sup>122</sup> *Id.* at 6, 17.

<sup>123</sup> RCC Reply Brief at ¶21.

<sup>124</sup> Id. at ¶6.

<sup>&</sup>lt;sup>125</sup> T. Vol. I at 306, 315.

Decision on February 27, 2004, suggesting the FCC encourage states to consider whether a more rigorous review may be needed to ensure that Federal universal service support is used properly. However, the Commission concludes that it is in the public interest to impose immediate reporting requirements on RCC at this time. An important factor persuading the Commission that it should grant ETC status to RCC is RCC's commitment to share its capital budget information with the Commission. To that end, the Commission requires RCC to provide the following information to the Commission within 30 days of the effective date of this Order:

- a) a projection of the amount of support RCC will receive from the FUSF in 2005;
- b) a capital expenditure budget for Kansas for 2005; and
- c) a verified statement regarding the use of support as is currently required of all ETCs

RCC will report the information listed above in 2006 and include data regarding its actual expenditures in Kansas in 2005 if the Commission has not adopted another reporting format. This requirement will continue unless and until the Commission replaces it with other requirements via the generic proceeding.

#### VIII. OTHER ISSUES

55. While the Commission believes that designating RCC as an ETC is reasonable given the requirements imposed in this order, the Commission believes there are issues that have been raised by the parties that require further discussion and analysis. Therefore, the

<sup>126</sup> In the Matter of the Certification of Compliance with Section 254(e) of the Federal Telecommunications Act of 1996, and Non-Rural Carrier Certification of Urban/Rural Rate Comparability, Docket No. 05-GIMT-112-GIT, Order Opening Docket and Assessing Costs, dated August 13, 2004, ¶3.

127 T. Vol. 1 at 28, 186.

Commission will open a generic proceeding to discuss the following issues related to ETC designations:

- a) minimum local usage;
- b) quality of service standards;
- c) content, frequency and types of media for advertising;
- d) per-minute blocking for wireless carriers;
- e) billing standards;
- f) build-out plans; and
- g) application of termination fees.

The Commission will request that interested parties provide comments on these issues. The Commission anticipates that any new ETC requirements that are developed in the generic proceeding will become applicable to any ETC wishing to retain its designation. Therefore, the Commission encourages participation by all ETCs.

### IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

- A. RCC's Petition for ETC Designation is hereby granted in the non-rural wire centers listed in Attachment A and the rural study areas listed in Attachment B, so long as the company agrees to comply with the additional requirements imposed by this Order. Such additional requirements are more fully set out in the body of this Order.
- B. The Commission declines to adopt a new definition for non-rural service areas at this time. For rural study areas, redefinition by wire center is deemed to be in the public interest when the population density analysis introduced in the *Virginia Cellular* Order is utilized to make such a determination. Attachment C contains those rural service areas for which the Commission finds redefinition to the wire center to be in the public interest. If the FCC concurs

with this decision, RCC is designated as an ETC in those areas set out in Attachment C subject to meeting the additional requirements imposed by this Order.

- C. Within 60 days of the effective date of this Order, RCC shall file a map indicating the extent of its existing infrastructure and the approximate geographic area for which service coverage is available from such facilities. Thereafter, a map shall be updated on a yearly basis and provided to the Commission by December 31 of each year.
- D. RCC is required to follow the six-step process it outlined for evaluating requests for service. Additionally, on a quarterly basis (January 1, April 1, July 1, and October 1), RCC is required to report all instances in which the company is unable to serve a customer. RCC is required to provide information regarding the specific location of the customer (street address), the company's rationale for reaching the final step of the process for each customer and the company's progress with establishing interconnection arrangements which permit resale of either wireless or ILEC services in the location of the customer the company was unable to serve.
- E. The Commission directs Staff and RCC to develop language used in all advertising for areas in which RCC is designated as an ETC. The language, among other things, should include information directing customers to the Commission's Office of Public Affairs and Consumer Protection for complaints regarding any service issues. Staff and RCC shall file a status report with the Commission within 90 days of the effective date of this Order informing the Commission of progress in meeting this requirement.
- F. RCC shall comply with CTIA's Code for Wireless Service and shall report the number of complaints per 1000 handsets for the preceding year on January 31 of each year.
- G. RCC is required to provide the following information related to its capital budget within 30 days of the effective date of this Order:

a) a projection of the amount of support RCC will receive from the FUSF in 2005:

b) a capital expenditure budget for Kansas for 2005; and

c) a verified statement regarding the use of support as is currently required of all

ETCs.

RCC will report this information in 2006 and include data regarding its actual expenditures in

Kansas in 2005 if the Commission has not adopted another reporting format. This requirement

will continue unless and until the Commission replaces it with other requirements via a generic

proceeding.

H.

The parties have 15 days, plus three days if service of this Order is by mail, from

the date this Order is served in which to petition the Commission for reconsideration of any issue

or issues decided herein. K.S.A. 66-118; K.S.A. 2003 Supp. 77-529(a)(1). The Commission

directs its Docket Room to serve this Order via facsimile on all parties in order to ensure timely

notification of RCC's ETC status.

I. The Commission retains jurisdiction over the subject matter and the parties for the

purpose of entering such further order or orders as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Moline, Chr.; Krehbiel, Com.; Moffet, Com.

Dated:

3 0 2004

ORDER MAILED

SEP 3 0 2004

an K Duffy

Susan K. Duffy Executive Director

**SBC** 

Attachments

36

## Attachment A

# SWBT WIRE CENTERS WHERE RCC MINNESOTA IS DESIGNATED AN ETC

Almena

Bird City

Colby

Dodge City

Garden City

Goodland

Great Bend

Hays

Holcomb

Hoxie

Kinsley

La Crosse

Larned

Liberal

Norton

Oakley

Oberlin

Pawnee Rock

Phillipsburg

**Plains** 

Plainville

Pratt

Scott City

Smith Center

Stafford

Stockton

Sublette

## RURAL LEC STUDY AREAS THAT ARE COVERED IN THEIR ENTIRETY BY RCC MINNESOTA

Elkhart Telephone Company, Inc. Golden Belt Telephone Association, Inc. Gorham Telephone Company, Inc. S&T Telephone Coop Association

# WIRE CENTERS WHERE RCC SHOULD BE DESIGNATED AN ETC IF THE FCC CONCURS WITH THIS COMMISSION'S DECISION TO REDEFINE THESE RLEC SERVICE AREAS TO THE WIRE CENTER LEVEL

Wire Center Telephone Company

LeotiSunflower Telephone Company, Inc.TribuneSunflower Telephone Company, Inc.Sharon SpringsSunflower Telephone Company, Inc.JetmoreSunflower Telephone Company, Inc.WallaceSunflower Telephone Company, Inc.MarienthalSunflower Telephone Company, Inc.WeskanSunflower Telephone Company, Inc.

Dorrance H&B Communications, Inc.

Sawyer Haviland Telephone Company, Inc.
Cullison Haviland Telephone Company, Inc.
Coats Haviland Telephone Company, Inc.
Isabel Haviland Telephone Company, Inc.

**Pioneer Communications** Satanta Lakin **Pioneer Communications Pioneer Communications** Hugoton Ulysses **Pioneer Communications Pioneer Communications** Deerfield Moscow **Pioneer Communications Pioneer Communications** Rolla **Pioneer Communications** Johnson **Pioneer Communications** Syracuse **Pioneer Communications** Manter Richfield **Pioneer Communications** Pioneer Communications Kendall Bog Bow **Pioneer Communications** Pioneer Communications Ryus

Victoria Rural Telephone Service Company, Inc. Hill City Rural Telephone Service Company, Inc. Wakeeney Rural Telephone Service Company, Inc. Rural Telephone Service Company, Inc. Quinter Rural Telephone Service Company, Inc. Palco Prairie View Rural Telephone Service Company, Inc. Rural Telephone Service Company, Inc. Natoma Olmitz Rural Telephone Service Company, Inc. Rural Telephone Service Company, Inc. Damar Zurich Rural Telephone Service Company, Inc. Grainfield Rural Telephone Service Company, Inc.

# Attachment C - Page 2 of 2

Rural Telephone Service Company, Inc. Lenora Rural Telephone Service Company, Inc. Rexford Selden Rural Telephone Service Company, Inc. Rural Telephone Service Company, Inc. Gaylord Jennings Rural Telephone Service Company, Inc. Rural Telephone Service Company, Inc. Collyer Rural Telephone Service Company, Inc. Woodston Rural Telephone Service Company, Inc. Logan Rural Telephone Service Company, Inc. Alton Rural Telephone Service Company, Inc. Long Island Rural Telephone Service Company, Inc. Morland Rural Telephone Service Company, Inc. Edmond Rural Telephone Service Company, Inc. Gove Galatia Rural Telephone Service Company, Inc. Iuka South Central Telephone Association, Inc. Sharon South Central Telephone Association, Inc.

Ellinwood Sprint/United Telephone Company
Osborne Sprint/United Telephone Company
Russell Sprint/United Telephone Company
Downs Sprint/United Telephone Company
Luray Sprint/United Telephone Company
Paradise Sprint/United Telephone Company

Hoisington Sprint/United Telephone Company- Eastern Claflin Sprint/United Telephone Company- Eastern Hudson Sprint/United Telephone Company- Eastern St. John Sprint/United Telephone Company- Eastern Preston Sprint/United Telephone Company- Eastern Sprint/United Telephone Company- Eastern Sprint/United Telephone Company- Eastern Macksville Sprint/United Telephone Company- Eastern

# LOUISIANA PUBLIC SERVICE COMMISSION

#### **ORDER NO. U-27289**

# NPCR, INC., D/B/A NEXTEL PARTNERS, EX PARTE

Docket No. U-27289 In re: Request for Authority for designation as an Eligible Telecommunications Carrier within the State of Louisiana, pursuant to Section 214(e)(6) of the Communications Act of 1934.

(Decided at the June 9, 2004 Business and Executive Session.)

# Nature of the Case

NPCR Inc., d/b/a Nextel Partners ("Nextel") filed a request April 24, 2003 seeking to be designated as eligible telecommunications carriers ("ETCs") pursuant to 47 U.S.C. § 214(e)(2) throughout its service area for purposes of receiving federal universal service support and high cost certification in Louisiana. 47 U.S.C. § 214(e)(2) provides that the Louisiana Public Service Commission ("Commission"), upon request and consistent with the public interest, convenience, and necessity, may in an area served by a rural telecommunications carrier, and shall in all other areas, designate more than one common carrier as an ETC for a service area designated by the state commission, so long as the carrier meets the requirements of 47 U.S.C. § 214(e)(1).

# Jurisdiction and Applicable Law

The Commission exercises jurisdiction over public utilities in Louisiana pursuant to the Louisiana Constitution Article IV, Section 21(B), which states:

The commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law. It shall adopt and enforce reasonable rules, regulations and procedures necessary for the discharge of its duties, and shall have other powers and perform other duties as provide by law.

Pursuant to the above authority, the Commission adopted the Regulations for Competition in the Local Telecommunications Market, as most recently amended in Appendix B to the General Order dated July 24, 2002. As defined therein in Section 101,

(6) Commercial Mobile Radio Service (CMRS) – a mobile service that is: (a)(1) provided for profit, i.e., with the intent of receiving

<sup>&</sup>lt;sup>1</sup> The application was erroneously filed under § 214(e)(6), which governs applications filed with the Federal Communications Commission seeking ETC status.

compensation or monetary gain; (2) an interconnected service; and (3) available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or (b) the functional equivalent of such a mobile service described in paragraph (a) of this definition. 47 CFR § 20.3, as amended. CMRS includes "Radio Common Carriers: as that term is defined and used in La. R.S. § 45:1500 et seq.

(7) Commercial Mobile Radio Service Provider – any person or entity engaged in the provision of a service that is a commercial mobile radio service. CMRS provider includes "Radio Common Carriers: as that term is defined and used in La. R.S. § 45:1500 et seq.

The Commission is given broad power to regulate telephone utilities and may adopt all reasonable and just rules, regulations, and orders affecting or connected with the service or operation of such business.<sup>2</sup> As stated previously, 47 U.S.C. § 214(e)(2) grants the power to the state commissions to designate a common carrier that meets the requirements of 47 U.S.C. § 214(e)(1) as an ETC for a service area specified by the commission.

The requirements of 47 USC § 214(e) are as follows:

- (1) Eligible telecommunications carriers A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received—
  - (A) offer the services that are supported by federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and
  - (B) advertise the availability of such services and the charges there for using media of general distribution.
- (2) Designation of eligible telecommunications carriers A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State

<sup>&</sup>lt;sup>2</sup> South Central Bell Tel. Co. v. Louisiana Public Service Commission, 352 So.2d 999, (La. 1977.)

commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

Additionally, the supported services that must be provided as a requirement for ETC designation are contained in 47 C.F.R. § 54.101, which provides as follows:

- (a) Services designated for support. The following services or functionalities shall be supported by federal universal service support mechanisms:
- (1) Voice grade access to the public switched network. "Voice grade access" is defined as a functionality that enables a user of telecommunications services to transmit voice communications, including signaling the network that the caller wishes to place a call, and to receive voice communications, including receiving a signal indicating there is an incoming call. For the purposes of this part, bandwidth for voice grade access should be, at a minimum, 300 to 3,000 Hertz;
- (2) Local usage. "Local usage" means an amount of minutes of use of exchange service, prescribed by the Commission, provided free of charge to end users;
- (3) Dual tone multi-frequency signaling or its functional equivalent. "Dual tone multi-frequency" (DTMF) is a method of signaling that facilitates the transportation of signaling through the network, shortening call set-up time;
- (4) Single-party service or its functional equivalent. "Single-party service" is telecommunications service that permits users to have exclusive use of a wireline subscriber loop or access line for each call placed, or, in the case of wireless telecommunications carriers, which use spectrum shared among users to provide service, a dedicated message path for the length of a user's particular transmission;
- (5) Access to emergency services. "Access to emergency services" includes access to services, such as 911 and enhanced 911, provided by local governments or other public safety organizations. 911 is defined as a service that permits a telecommunications user, by dialing the three-digit code "911," to call emergency services through a Public Service Access Point (PSAP) operated by the local government. "Enhanced

911" is defined as 911 service that includes the ability to provide automatic numbering information (ANI), which enables the PSAP to call back if the call is disconnected, and automatic location information (ALI), which permits emergency service providers to identify the geographic location of the calling party. "Access to emergency services" includes access to 911 and enhanced 911 services to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems;

- (6) Access to operator services. "Access to operator services" is defined as access to any automatic or live assistance to a consumer to arrange for billing or completion, or both, of a telephone call;
- (7) Access to interexchange service. "Access to interexchange service" is defined as the use of the loop, as well as that portion of the switch that is paid for by the end user, or the functional equivalent of these network elements in the case of a wireless carrier, necessary to access an interexchange carrier's network;
- (8) Access to directory assistance. "Access to directory assistance" is defined as access to a service that includes, but is not limited to, making available to customers, upon request, information contained in directory listings; and
- (9) Toll limitation for qualifying low-income consumers. Toll limitation for qualifying low-income consumers is described in subpart E of this part.
- (b) Requirement to offer all designated services. An eligible telecommunications carrier must offer each of the services set forth in paragraph (a) of this section in order to receive federal universal service support.
- (c) Additional time to complete network upgrades. A state commission may grant the petition of a telecommunications carrier that is otherwise eligible to receive universal service support under Sec. 54.201 requesting additional time to complete the network upgrades needed to provide single-party service, access to enhanced 911 service, or toll limitation. If such petition is granted, the otherwise eligible telecommunications carrier will be permitted to receive universal service support for the duration of the period designated by the state commission. State commissions should grant such a request only upon a finding that exceptional circumstances prevent an otherwise eligible

telecommunications carrier from providing single-party service, access to enhanced 911 service, or toll limitation. The period should extend only as long as the relevant state commission finds that exceptional circumstances exist and should not extend beyond the time that the state commission deems necessary for that eligible telecommunications carrier to complete network upgrades. An otherwise eligible telecommunications carrier that is incapable of offering one or more of these three specific universal services must demonstrate to the state commission that exceptional circumstances exist with respect to each service for which the carrier desires a grant of additional time to complete network upgrades.

Consistent with the above sections, the Commission issued a General Order dated May 20, 2004, which establishes specific public interest criteria applicable for applications seeking ETC designation in areas served by rural telecommunications carriers.

Finally, Rule 57 of the Louisiana Public Service Commission's Rules of Practice and Procedure, provides as follows,

Every ruling of an administrative law judge shall be subject to review by the Commission upon its own motion. The Commission may also, upon its own motion, assert its original and primary jurisdiction and consider any question or issue pending before an Administrative Law Judge. (Emphasis added).

#### Background and Procedural History

Nextel filed an application with the Commission on April 24, 2003 seeking designation as an ETC pursuant to § 214(e)(6) of the Communications Act of 1934 for the purposes of receiving federal universal service support in Louisiana.<sup>3</sup> Notice of the application was published in the Commission's Official Bulletin dated May 9, 2003 with an intervention period of 25 days.

Timely interventions were filed by the following: The Small Company Committee ("SCC"); Lafourche Telephone Company, LLC; EATEL; Elizabeth Telephone Company; Cameron Telephone Company; CenturyTel of Northwest Louisiana, Inc.; CenturyTel of Central Louisiana, LLC; CenturyTel of Ringgold, LLC; CenturyTel of Southeast Louisiana, Inc.; CenturyTel of North Louisiana, LLC; CenturyTel of East Louisiana, LLC and CenturyTel of Southwest Louisiana, LLC; CenturyTel of Evangeline, LLC; CenturyTel of Chatham, LLC; Centennial Wireless, and Cox Louisiana Telecom.

<sup>&</sup>lt;sup>3</sup> The Communications Act of 1934 was revised in 1996 and is now referred to as the Telecommunications Act of 1996.

On June 23, 2003 a status conference was held during which the parties agreed that the issues may be presented for decision to the tribunal through briefing, but scheduled a hearing date in the event it may be necessary. In accordance with the procedural deadlines established at the June 23, 2003 status conference, comments were received from the Small Company Committee and Cameron and Elizabeth Telephone, and reply comments from Nextel. A hearing was conducted before the Administrative Hearings Division on September 29, 2003, wherein the parties presented oral argument before the ALJ. Following this hearing, both the Small Company Committee and Nextel filed post-hearing briefs. Prior to any recommendation being issued by the ALJ, the Commission, at its March Business and Executive Session, directed the Administrative Hearings Division to stay all pending requests for ETC designation in rural areas until the Commission established specific public interest criteria applicable to such requests.

Following the issuance of the General Order dated May 20, 2004, which established said public interest criteria, the Commission pursuant to its Rule 57 authority, exercised its primary jurisdiction over Nextel's request so that the matter might be considered at its June 9, 2004 Business and Executive Session.

#### Commission's Consideration

Nextel's request was considered by the Commission, pursuant to Rule 57, at its June 9, 2004 Business and Executive Session. Commissioner Field presented the following motion on the request:

In accordance with Rule 57 of the Commission's Rules of Practice and Procedure, I move that the Commission assert its original and primary jurisdiction over Nextel Partner's application for federal ETC status, currently pending before the ALJ in Docket No. U-27289, and approve the application for the following reasons and subject to the following conditions:

- (1) Nextel Partner's filed its application for federal ETC status on April 24, 2003 14 months ago;
- (2) The parties in Docket No. U-27289 filed comments and briefs, and also held a hearing before the ALJ on September 29, 2003;
- (3) For Nextel Partners to meet the June 30, 2004 deadline established by federal law and be eligible to receive ETC funding for the last quarter of 2004 and start investing those funds in Louisiana, its ETC application must be considered at the June Business & Executive Session. Otherwise, Nextel Partners will be ineligible to receive any federal ETC support in 2004;
- (4) Based upon the record evidence, Nextel Partners meets all the criteria for ETC designation contained in Section 214(e)(1) of the Telecom Act, as it (1) is a common carrier, (2) currently provides each of the supported services required of an ETC under 47 C.F.R. Section 54.101(a), and will offer all of those services to its universal service customers once designated an ETC, (3) advertises the availability of the supported services and charges using media of general distribution, (4) offers the required services using its own facilities or a combination of its own facilities and another carrier's

- services, and (5) identified the service areas through which it will offer and advertise the supported services;
- (5) In addition to the criteria listed above, in Docket No. R-27841, the Commission established *Public Interest* criteria and conditions that must be applied on a case-by-case basis to carriers seeking ETC designation in rural service areas of the State, and issued General Order dated May 20, 2004, setting forth conditions that must be satisfied by and applied to each applicant applying for ETC status in the Rural ILEC areas of the State;
- (6) Granting Nextel Partners' ETC application is consistent with the Public Interest and Nextel Partners satisfies the Public Interest criteria set forth in Commission General Order dated May 20, 2004;
- (7) Nextel Partners' ETC status shall be subject to and conditioned upon Nextel's continued satisfaction of and compliance with each of the public interest criteria and conditions established by Commission General Order dated May 20, 2004;
- (8) In addition to the requirements and obligations set forth in Commission General Order dated May 20, 2004, Nextel Partners' ETC status will be subject to the following specific conditions and obligations:
- (9) Nextel Partners shall ensure a commitment to quality of service consistent with the public interest by committing to -

Respond to reasonable requests for service from customers within its designated service areas by implementing the following six-step procedure:

- A. If a request comes from a customer within its existing network, Nextel Partners will promptly provide service using customer equipment selected by the customer. In practice, if Nextel Partners receives a request for service prior to 4:00 P.M., the phone will be delivered by overnight mail the following morning.
- B. If a customer cannot be served by existing network facilities, Nextel Partners will allow the customer to make a written request for service in a specific location. In response, Nextel Partners will take a series of steps to provide service:
  - 1) Nextel Partners will determine whether the customer's equipment can be modified or replaced to provide service in a desired location.
  - 2) Nextel Partners will determine whether the customer could be provided with other network equipment (booster, antenna, or 3-watt unit) to provide service in the requested location.
  - 3) Nextel Partners will determine whether adjustments at the nearest cell site can be made to provide service.
  - 4) Nextel Partners will determine whether there are any other adjustments to either the network or the customer's facilities that can be made to provide service.
  - 5) Nextel Partners will explore the possibility of offering resold service of carriers that have facilities available to provide service in that location.
  - 6) Nextel Partners will determine whether additional network infrastructure (additional cell site, extender or repeater) could be

constructed to provide service, and evaluate the costs and benefits of using high-cost universal service support to serve a number of customers requesting service.

If, after these steps, the customer cannot be served, Nextel Partners will notify the customer and provide the Commission with an annual report of how many requests for service could not be filled.

- (10) Nextel Partners commits to construct and put into operation twelve (12) additional cell cites through July 2005 and twelve (12) additional cell sites through 2006 in the service areas where it is designated as an ETC. Nextel Partners has submitted to the Commission its preliminary build-out plans pursuant to Rule 12.1 governing trade secret, confidential and proprietary information for review by Staff and Commissioners. The specific parameters of the build-out plans may evolve over time as Nextel Partners responds to consumer demand. Nextel Partners will submit information to the Commission on a quarterly basis detailing its progress toward meeting its build-out plans in the service areas where it is designated as an ETC;
- (11) Nextel Partners will use all federal high-cost support provided to it within the State of Louisiana and only for the provision, maintenance and upgrading of facilities and services for which the support is intended as required by 47 U.S.C. Section 254(e) and 47 C.F.R. Section 54.313(a);
- (12) Nextel Partners seeks to serve the entire Rural Telephone Company study areas for rural areas where it is designated an ETC. Nextel Partners does not seek to redefine any Rural ILEC study areas.

Therefore, in light of the commitments made by Nextel Partners, and subject to each criteria and condition of Commission General Order dated May 20, 2004, I move that we grant Nextel Partners' application for federal ETC status.

Commissioner Blossman seconded Commissioner Field's motion, with Commissioner Campbell voting yes, Commissioner Sittig voting no, and Commissioner Dixon abstaining.

#### IT IS THEREFORE ORDERED THAT

- 1. Nextel be designated an Eligible Telecommunication Carrier as requested in its application in Docket U-27289, for the purpose of receiving Universal Service Funds in the areas set forth in "Attachment A", subject to the conditions in the above motion.
- 2. This Order shall be effective immediately.

# BY ORDER OF THE COMMISSION BATON ROUGE, LOUISIANA

/S/ IRMA MUSE DIXON (ABSTAINED)
DISTRICT III
CHAIRMAN IRMA MUSE DIXON

/S/ C. DALE SITTIG (VOTING NO)
DISTRICT IV
VICE CHAIRMAN C. DALE SITTIG

/S/ JAMES M. FIELD
DISTRICT II
COMMISSIONER JAMES M. FIELD

/S/ JACK "JAY" A. BLOSSMAN
DISTRICT I
COMMISSIONER JACK "JAY" A. BLOSSMAN

LAWRENCE C. ST. BLANC SECRETARY

/S/ FOSTER L. CAMPBELL
DISTRICT V
COMMISSIONER FOSTER L. CAMPBELL

STATE OF MAINE PUBLIC UTILITIES COMMISSION

Docket No. 2002-344

May 13, 2003

RCC MINNESOTA, INC.
SRCL HOLDING COMPANY
SACO RIVER COMMUNICATIONS CORPORATION
Request For Designation As Eligible
Telecommunications Carrier

ORDER

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

# I. SUMMARY

In this Order, we designate RCC Minnesota, Inc. (RCC)<sup>1</sup> as an eligible telecommunications carrier (ETC) pursuant to Section 214(e)(2) of the Telecommunications Act of 1996 (TelAct) and Section 54.201 of the Federal Communications Commission's (FCC) Rules, 47 C.F.R. § 54.201.

# II. PROCEDURAL HISTORY

RCC is a predominately rural wireless carrier which serves in many areas throughout the state. On June 7, 2002, RCC submitted an Application seeking designation as an ETC pursuant to Section 214 (e)(2) of the TelAct and 47 C.F.R. § 54.201. RCC requested that it be designated as eligible to receive all available support from the federal Universal Service Fund (USF) including, but not limited to, rural, insular and high cost areas and low income customers.

Following notice of the Proceeding, Petitions to Intervene (all of which were granted) were received from Community Service Telephone Company (CST), the Telephone Association of Maine (TAM), and the Office of the Public Advocate (OPA). Verizon Maine obtained limited intervenor status. CST, TAM and OPA filed comments on July 30, 2002, in response to a July 1, 2002 Procedural Order requesting a preliminary response to RCC's application. After discovery by the intervenors on RCC, a Technical Conference was held on October 8, 2002. Thereafter, pursuant to a November 27, 2002 Procedural Order, TAM, CST and OPA filed Briefs on December 23, 2002. On January 24, 2003, RCC prefiled the testimony of Rick O'Connor, Senior Vice President for RCC's Northern Region (which includes Maine), three State of Maine Legislators (the "Legislative Witnesses") and nine other Maine citizens, together with its

<sup>&</sup>lt;sup>1</sup>RCC does business in Maine as Unicel.

<sup>&</sup>lt;sup>2</sup>All parties were invited to file both testimony and legal briefs. TAM, OPA, and CST only filed legal briefs.

Brief. RCC then responded to a further round of discovery from OPA, TAM and CST on February 14, 2003. On February 26, 2003, RCC filed a letter with the Commission indicating that it would be offering the statements of its Legislative Witnesses as comments from interested parties, but not for evidentiary purposes.

On February 28, 2003, RCC and the OPA filed a Stipulation which recommended that the Commission accept and adopt the Stipulation as its final disposition in the case. On March 3, 2003, both a hearing and oral argument were held in this matter. All parties attended and participated.

On April 17, 2003, the Hearing Examiner issued an Examiner's Report in the form of a Draft Order recommending that the Commission accept the terms of the Stipulation submitted by RCC and the OPA and thereby designate RCC as an ETC. Exceptions to the Examiner's Report were filed by RCC, TAM, and CST.

# III. LEGAL STANDARDS

The Telecommunications Act of 1996 provided for the continuing support of universal service goals by making federal USF available to carriers which are designated as ETCs. Section 214(e)(2) of the TelAct gives state commissions the primary responsibility for designating carriers as ETCs.<sup>3</sup> To be designated an ETC, a carrier must offer all nine of the services supported by the universal service fund<sup>4</sup> to all customers within the ETC's service area and advertise the availability of those services throughout the service area.<sup>5</sup> Further, as a condition for receipt of federal USF support, each year a carrier must certify to the state commission and the FCC that the funds it receives are being used in a manner consistent with the requirements of 47 U.S.C § 254(e).

In the case of an area served by a rural ILEC, the ETC's designation must be in the public interest.<sup>6</sup> There is little guidance, however, within the TelAct

<sup>&</sup>lt;sup>3</sup>47 U.S.C. § 214(e)(2). See also Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12255, ¶ 93 (2000) (Twelfth Report and Order).

<sup>&</sup>lt;sup>4</sup>The FCC has defined the services that are to be supported by the federal universal service support mechanisms to include: (1) voice grade access to the public switched network; (2) local usage; (3) Dual Tone Multifrequency (DTMF) signaling or its functional equivalent; (4) single-party service or its functional equivalent; (5) access to emergency services, including 911 and enhanced 911; (6) access to operator services; (7) access to interexchange services; (8) access to directory assistance; and (9) toll limitation for qualifying low-income customers. 47 C.F.R. § 54.101(a).

<sup>&</sup>lt;sup>5</sup>47 U.S.C. §214(e)(1); 47 C.F.R. § 54.101(a).

<sup>&</sup>lt;sup>6</sup>47 U.S.C. § 214(e)(2).

regarding how state commissions should evaluate the "public interest" in this context. Other state commissions have found that they should take into account the purposes of the Act and consider the relative benefits and burdens that an additional ETC designation would bring to consumers as a whole. The FCC, when acting in the place of a state commission because of jurisdictional limitations, has considered such factors as: (1) whether the customers are likely to benefit from increased competition; (2) whether designation of an ETC would provide benefits not available from ILECs; and (3) whether customers would be harmed if the ILEC decided to relinquish its ETC designation.

# IV. PARTIES' POSITIONS

#### A. RCC

RCC claims that designation as in ETC is in the public interest because it will allow RCC to "secure USF support for direct investments in Maine's wireless telecommunications infrastructure – investments that either would not be made in the absence of USF support, or will be substantially delayed." RCC also claims that competition will be bolstered by its designation.

RCC seeks designation only in those areas covered by its federal licenses. Because federal wireless licenses are granted on the basis of municipal and county boundaries, they do not match wireline exchange boundaries. Thus, RCC also requests that the service areas of 20 rural independent telephone companies (ITCs) be modified so that RCC can meet its federal requirement of offering service throughout the service area. RCC believes that re-alignment of Verizon's service areas is not required. RCC states that modification of the ITCs' boundaries will not impact the amount of support the ILEC receives because the support is calculated on a study area, not service area, basis. RCC also claims that the Commission should not be concerned with "cream skimming" because it is willing to serve all areas covered by its federal license – it is not picking and choosing certain areas to serve because they are low cost.

Finally, RCC believes that the Commission's authority to regulate its practices is severely limited by both federal and state law. Specifically, federal law preempts state commissions from regulating the entry and rates of wireless carriers. RCC urges a broad interpretation of this limitation. In addition, RCC

<sup>&</sup>lt;sup>7</sup>See e.g., In the Matter of the Petition of RCC Minnesota, Inc. For Designation as an Eligible Telecommunications Carrier, Wash. Utilities and Transportation Commission, Docket No UT-02033, Order (Aug 14, 2002) at ¶ 10.

<sup>&</sup>lt;sup>8</sup>In the Matter of the Federal State Joint Board on Universal Service, RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout Its Licensed Service Area in the State of Alabama, CC Docket 96-45, DA 02-3181, Memorandum Opinion and Order (Nov. 26, 2002) (Alabama Order).

argues that the Commission is a "creature" of the Legislature and that 35-A M.R.S.A. § 102(13) generally precludes Commission jurisdiction over wireless service. RCC acknowledges that 35-A M.R.S.A. § 102(13)(C) provides for Commission assertion of jurisdiction after an investigation and a determination that a wireless carrier is offering basic local exchange service but claims that TAM should have requested such an investigation at the outset of the proceeding and that no factual grounds exist to warrant an investigation.

RCC is a party to the Stipulation that was submitted to the Commission on February 28, 2003. The Stipulation is discussed in Section E below.

# B. <u>TAM</u>

TAM argues that RCC has not met its burden of proof to show that it meets the requirements for becoming an ETC. TAM argues that the goal of universal service is not increased competition, but rather ensuring that as many people as possible are connect to the public switched network. It questions why RCC's designation would be in the public interest, especially in light of the fact that RCC admits that its service would not likely be used as a substitute for landline phones but instead as a secondary line for mobile telecommunications purposes. Thus, TAM believes that RCC has not shown that RCC's use of federal USF monies will advance universal service goals in Maine and, accordingly, be in the public interest.

TAM further argues, however, that if the Commission does decide to grant RCC ETC status, RCC should be subject to the same obligations as wireline ETCs. TAM also takes the position that before the Commission can designate RCC as an ETC it must find under 35-A M.R.S.A. § 102(13) that RCC is offering basic local exchange service and thus is subject to Commission regulation, including the requirements of Chapter 290. TAM argues that while the Commission is preempted from regulating the entry and rates of wireless carriers, the FCC has made clear that the state commissions may regulate wireless carriers in the areas of billing practices, customer protection, and matters relating to the provisioning of universal service.

# C. CST

CST urges the Commission not to grant RCC's ETC application because it believes the consequences of granting ETC status to wireless carriers such as RCC are injurious to the public interest and outweigh any benefits that might exist. CST outlined a number of specific concerns, most of which center on four themes. First, CST believes that the potential positive effect on universal service resulting from granting ETC status to wireless carriers is *de minimis* because of Maine's already very high universal service penetration. Second, CST is concerned that support for wireless carriers will enable them to "take"

customers from rural carriers, resulting in lower revenue streams to rural carriers who will then look to both federal and state USF mechanisms for more support as well as to customers for higher rates. Third, CST believes that the strain on state and federal USF mechanisms will become politically impossible to support and that customers in rural areas will suffer because of increased rates. Finally, CST argues that there is no assurance that receipt of USF support will result in RCC doing anything different from what it would have done without USF support and that approval of RCC's Request could create additional costs for rural ILECs by causing them to redefine service areas.

# D. OPA

The OPA's position throughout this proceeding has been that RCC's application should only be approved if RCC satisfies "certain conditions required by the public interest." In its December 23, 2002 Comments, the OPA outlined the conditions it sought, namely, that RCC offer a "basic service" plan that is priced at or below the basic rates of other local providers and that RCC provide specific information to the Commission concerning how the USF funds are being used to improve wireless coverage of wireless areas in Maine. The OPA also took the position in December that the Commission should assert jurisdiction over RCC pursuant to 35-A M.R.S.A. § 102(13)(C) and that all Commission Rules applicable to wireline ETCs should apply equally to RCC.

In late February, the OPA modified its position when it and RCC came to an agreement regarding the terms under which RCC should be granted ETC status. The OPA's modified position is discussed below.

# E. Terms of the Stipulation

On February 28, 2003, the OPA and RCC submitted a Stipulation "intended to resolve the outstanding issues" in this proceeding. It appears that TAM and CST were not included in the early stages of discussions between the OPA and RCC but that they were advised of the discussions several days before the Stipulation was filed and were given an opportunity to participate in the discussion at that time.

The Stipulation provides for the following resolution of the case:

- a. RCC is designated an ETC in the areas where it is licensed to provide wireless service in Maine, thus necessitating the redefinition of certain ILEC service areas;
- RCC will make good faith efforts to establish a call
  placement service which would allow persons to reach RCC
  customers even when the person does not know the
  customer's number;

- c. RCC will establish a Universal Service Rate Plan for \$15.00 per month; and
- d. RCC will comply with Chapters 290 and 294 of the Commission's Rules.

At the hearing, both the OPA and RCC urged the Commission to adopt the Stipulation as a fair resolution of the matter. The OPA stated that the most obvious benefit of RCC's designation would be additional monies for infrastructure improvement in Maine. The OPA also noted that the Stipulation included benefits that were not originally included in RCC's application, including the provision of a basic service plan and compliance with Chapter 290 of the Commission's Rules. Finally, the OPA responded to TAM's concerns regarding RCC compliance with other Commission rules by commenting that there were no "burning issues" associated with those rules and thus no immediate need to pursue their enforcement against RCC.

TAM, both in written comments and at the hearing, argued that the Stipulation falls far short of the necessary safeguards to protect customers of an ETC, whether it is wireless or wireline, and to ensure that the goals of universal service are truly met. TAM believes that the Stipulation is not in the public interest, and would undermine the requirement that the Commission find that granting RCC ETC status is in the public interest before approving RCC's request to be certified as an ETC. Moreover, TAM believes that the Commission should have regulatory jurisdiction over RCC pursuant to 35-A MRSA § 102(13)(C) and that this issue would be best resolved as a part of this proceeding. Additionally, TAM believes that, in addition to Chapter 290, RCC should be required to comply with many other Commission rules, such as Chapters 130, 140 210, 296, 297, and 895. Ultimately, however, TAM's greatest concern, and the focal point of its arguments, is the long-term viability of universal service (and thus the viability of the independent telephone companies that rely upon universal service) if RCC and other wireless carriers are certified as ETCs.

CST's arguments against both RCC's application and the Stipulation focused on the public interest standard. CST argued that granting RCC's application might be at odds with statutes requiring that telephone service be adequately provisioned and reasonably priced. CST's arguments were based upon concerns similar to those of TAM regarding the long-term viability of universal service if wireless carriers are certified as well as the competitive impact of ETC designation on the ITCs. CST also raised arguments relating to its need to average costs over its service area in order to meet requirements that pricing be averaged.

#### V. DECISION

Based upon the record before us and for the reasons discussed below, we find that RCC meets all of the requirements of 47 U.S.C. § 214(e)(2) and 47 C.F.R. § 54.201 and designate RCC as an ETC in those areas covered by its federal wireless license in Maine.<sup>9</sup>

# A. Required Service and Advertising

As stated above, an ETC must offer and advertise the services supported by the federal universal service mechanisms throughout the designated service area. <sup>10</sup> Early in the proceeding there were concerns regarding the ubiquity of RCC's service within its territory and the quality of the service provided. RCC witness Rick O'Connor testified that RCC did, in fact, offer the required services and advertise their availability. He further testified that RCC would agree to supply service to anyone who asked for it within its designated service area. At the hearing, none of the parties cross-examined Mr. O'Connor regarding these assertions nor did the parties offer any testimony to controvert Mr. O'Connor's assertions.

Based upon our own review of the record, we find that RCC does offer all of the required services and that it does (or will) advertise their availability. With regard to concerns relating to ubiquity of service and the obligation to serve all customers, we first find that the FCC's rules do not require a carrier to have the capability to serve all customers at the time of designation, only that the carrier be willing to serve all customers.<sup>11</sup> The FCC has said that to

<sup>&</sup>lt;sup>9</sup>In reviewing a stipulation submitted by the parties to a proceeding, we consider whether the parties joining the stipulation represent a sufficiently broad spectrum of interests such that there is no appearance or reality of disenfranchisement, whether the process was fair to all parties, and whether the stipulated result is reasonable and in the public interest. Consumers Maine Water Co., Proposed General Rate Increase of Bucksport and Hartland Divisions, Docket No. 96-739 (Me. P.U.C. July 3, 1997). The Hearing Examiner recommended accepting the Stipulation based upon a finding that all of the conditions for accepting a Stipulation were met. In its Exceptions, CST argued that the Commission should not accept the Stipulation because it does not represent the full spectrum of interests involved in the case and does not provide a basis for findings of fact on the public interest standard. We find it unnecessary to reach the question of the validity of the Stipulation because the record before us contains sufficient information upon which to base our decision. Thus, we do not address in detail the concerns of CST about the full spectrum of interest signing onto the Stipulation. We do note, however, that TAM and CST were afforded an opportunity to participate in the settlement discussions, albeit later in the process. Further, neither TAM nor CST complained about the settlement process during the hearing and oral argument held on March 5, 2003.

<sup>&</sup>lt;sup>10</sup>47 U.S.C. § 214(e)(1).

<sup>&</sup>lt;sup>11</sup>See Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling, CC Docket No. 96-45, 15 FCC Rcd 15168 at 15175, ¶ 17 (2000) (Declaratory Ruling), pet'n for recons. pending.

"require a carrier to actually provide the supported services before it is designated an ETC has the effect of prohibiting the ability of prospective entrants from providing telecommunications service." Instead, "a new entrant can make a reasonable demonstration . . . of its capability and commitment to provide universal service without the actual provision of the proposed service." Section 22.99 of the FCC's rules acknowledges the existence of "dead spots" in cellular service and states that "[s]ervice within dead spots is presumed." Finally, we take judicial notice of the extensive advertising done by RCC and other cellular providers in Maine and we accept RCC's commitment to use a portion of its advertising budget to increase customer awareness of Lifeline and Link-Up.

# B. Public Interest

The concept of universal service is a broad one, especially as articulated in TelAct. Universal service should include choice in providers and access to modern services. Designating RCC as an ETC will allow rural customers to enjoy the same choices in telecommunications that urban customers have, including additional access to broadband through wireless devices. Further, because of the way federal USF is calculated, designation of RCC will not take any money away from Maine's rural ILECs. Indeed, neither TAM nor CST specifically refuted the assertions by RCC that the support to all the incumbent wireline carriers will be unchanged by the granting of ETC status to RCC. Finally, CST's claim that granting RCC ETC status could result in higher rates for incumbent customers is not supported by any evidence or analysis.

In its Exceptions, CST argues that the public interest standard has not been met. Specifically, CST claims that the Examiner's Report did not make findings on many public interest issues, such as the impact on the universal service fund, rates of rural telephone companies, and the harm to rural telephone companies by increased competition.

While we acknowledge the possibility raised by CST (and TAM) that providing USF support for wireless service (which in most instances will be a second line) may ultimately not be a sustainable policy and may have competitive impacts on ITCs, we find that RCC meets the statutory requirements and that Maine consumers (who pay into the federal USF) should not be denied benefits. The public interest is not as narrow as CST has defined it. The evidence that RCC will the funds made available by ETC status to increase the availability of additional services and increase investment in rural Maine supports our conclusion that granting ETC status is the public interest.

<sup>&</sup>lt;sup>12</sup>ld. at ¶¶ 12-14.

<sup>&</sup>lt;sup>13</sup><u>ld</u>. at ¶ 24.

<sup>&</sup>lt;sup>14</sup>ld.

At this time, there is no evidence before us to suggest that the list of horribles advanced by CST will, in fact, occur. As the events of the last three years have shown, predicting the future in the telecommunications arena has proven to be one of the fastest roads to bankruptcy. Absent good reason to believe that an adverse consequence will occur, or that the effects will be severe and irreversible 15, we are unwilling to forgo the benefits that are likely to be achieved by granting the petition. Further, while granting RCC status as an ETC may exacerbate CST's concerns, it does not bring them into existence. Federal policy already allows wireless carriers to compete with rural telephone companies. Thus, the FCC has already determined that the benefits of having this new and potentially competing technology outweigh the harm that may flow to the rural telephone companies or the potential impact on the USF.

Finally, we do not believe this proceeding is the appropriate forum for resolving many of the issues raised by TAM and CST. The FCC has recently requested the Federal-State Joint Board on Universal Service (Joint Board) to provide recommendations to the FCC relating to high-cost universal service support in study areas in which a competitive ETC is providing service, as well as issues relating to USF support for second lines. Issues of rate rebalancing and deaveraging are very complex. An exploration of those issues will require the development of an extensive record and consideration of many factors beyond the scope of this proceeding. We do not believe the decision we make today will foreclose our ability to address the issues in full at the appropriate time.

# C. Service Area Boundaries

No party has contested RCC's designation in Verizon's study area. Further, no party has disputed RCC's assertion that the Commission does not have to re-draw Verizon's service area boundaries to conform with RCC's licensing boundaries but instead may designate RCC's ETC service area as those portions of Verizon's service area covered by RCC's cellular license. It appears from our review of the FCC's recent decision designating RCC as an ETC in Alabama that RCC's assertions are correct.<sup>17</sup>

Differences in RCC coverage and ITC boundaries, as well as federal law regarding rural study areas, require a different approach in rural independent telephone company areas. Under section 214(e)(5), a rural company's "service area" (for purposes of competitive ETC coverage) is the

<sup>&</sup>lt;sup>15</sup>This possibility is greatly reduced by the requirement that we review the ETC designation annually.

<sup>&</sup>lt;sup>16</sup>See <u>Federal-State Joint Board on Universal Service</u>, CC Docket 96-45, FCC 02-307, Order (rel. Nov. 8, 2002).

<sup>&</sup>lt;sup>17</sup>Alabama Order at ¶ 33.

same as the company's "study area" (used to determine USF) unless and until the FCC and the State, after taking into account recommendations of the Joint Board, establish a different definition of service area for such company.

In the FCC's *RTF Order*, the FCC determined that USF support should be disaggregated and targeted below the study area level to eliminate uneconomic incentives for competitive entry caused by the averaging of support across all lines served by a carrier within its study area.<sup>18</sup> Under disaggregation and targeting, per-line support is more closely associated with the cost of providing service.<sup>19</sup> Section 54.315 of the FCC's rules required rural carriers to choose one of three disaggregation paths by May 15, 2002. All carriers in Maine, except CST, Island, and Somerset chose Path 1, which does not require them to disaggregate support.<sup>20</sup> Community Service, Island, and Somerset chose Path 3, which required them to self-certify to the state commission that they had disaggregated in compliance with FCC rules.

The circumstances described above require us to take two different approaches to certifying RCC in ITC areas. First, we address rural ILECs whose entire study area is covered by RCC, namely Bryant Pond, China, Cobbosseecontee, Hampden, Hartland & St. Albans, Lincolnville, Mid-Maine, Saco, Sidney, Tidewater, Unity and Warren. For these companies, no additional steps need be taken by the Commission to certify RCC because their service areas and study areas are the same. There is a question, however, concerning whether RCC's certification would cause these ITCs to reconsider their decision not to disaggregate and whether that causes a significant administrative burden. In its Exceptions, TAM argues that while it cannot provide specific information on the costs and administrative burdens associated with disaggregating, rural telephone companies should not be forced to disaggregate. TAM claims that "catering" to RCC impedes the ability of the ITCs to make their own business choices regarding dissagregation.

While dissagregation may impose some administrative burden, the benefit of preventing "cream skimming" by any future CLEC ETCs is generally desirable, even if RCC is not granted ETC status. Neither TAM nor CST has provided any detailed analysis of the costs or burdens associated with disaggregating USF support. CST has stated that the dissagregation it undertook voluntarily pursuant to the *RTF Order* took some time and effort to determine how to disaggregate. However, CST also acknowledged that disaggregation itself did not impact CST's bottom line. Further, we do not see dissagregation to the wire center level as a serious cause for concern. Most wire

<sup>&</sup>lt;sup>18</sup>See RTF Order, 16 FCC Rcd at 11302, ¶ 145.

<sup>&</sup>lt;sup>19</sup>Id

<sup>&</sup>lt;sup>20</sup>Path 1 remains in place for at least four years unless modified by a state commission to require targeting and disaggregation as provided in Path 2 or Path 3.

centers in Maine contain a mix of downtown, suburban, and rural areas. Even if RCC can only service one exchange rather than a carrier's entire study area, RCC will still be serving many of the more rural customers, which are generally more expensive to serve.

Thus, we certify RCC as an ETC in the areas described above and leave it up to the individual ITC to determine whether disaggregation of support is needed. If they choose to disaggregate further, they should file a petition with the Commission.

The second approach<sup>21</sup> to certification involves rural ILECs where RCC does not serve the full study area but either completely covers some of the ILEC's individual wire centers or covers only part of a specific wire center. (See Attachment A.) In order to certify RCC in these wire centers, we must first make certain findings relating to recommendations made by the Joint Board regarding rural study areas. The Joint Board factors to be considered include: (1) the potential for "cream skimming" if a competitive ETC does not have to serve the full study area; (2) the different competitive footing of rural telephone companies under the TelAct; and (3) the administrative burden imposed on rural telephone companies by requiring them to calculate costs at something other than a study area level.<sup>22</sup> After we make our findings, either RCC or the Commission must petition the FCC for concurrence with our determination.

We find that the cream-skimming concerns are alleviated by the fact that RCC has not specifically picked the exchanges or partial exchanges that it will serve but instead the area was defined by the FCC in its wireless licensing process. We are not concerned the RCC is targeting any specific areas or that any of the partial exchanges would result in a windfall due to service to a highly populated area. Indeed, all of the partial exchanges are located in very rural areas of Maine. We further find that these companies, like the companies discussed above, have the option of disaggregating their USF support beyond just wire center boundaries, thereby lessening the opportunity for a windfall for RCC should only customers in less rural areas subscribe to RCC's service.

Thus, for the companies listed in Attachment A, we will require that their service area be disaggregated into service areas that are conterminous with wire center boundaries. To the extent that these companies wish to further disaggregate support, they should file a petition with the Commission. Finally, RCC should petition the FCC for concurrence in the new service area definitions.

<sup>&</sup>lt;sup>21</sup>The Examiner's Report incorrectly stated that a third approach involving a waiver from the FCC was necessary to certify RCC in areas where it only covers part of an exchange. In its Exceptions, RCC correctly pointed out that the FCC found that wireless carriers need only service those portions of a wire center covered by the their federal wireless license. *Alabama Decision* at ¶ 33.

<sup>&</sup>lt;sup>22</sup> See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Recommended Decision, 12 FCC Rcd 87, 179-80, ¶¶ 172-74 (1996) (*Recommended Decision*).

# D. <u>Compliance with Commission Rules and Other Conditions</u>

Finally, with regard to RCC's status as an ETC and the jurisdiction of the Commission, we concur with the result reached in the Stipulation, namely, that RCC must comply with the two Rules which directly apply to ETCs — Chapters 290 (consumer protection) and 294 (Lifeline) but that RCC is not considered a provider of basic service under 35-A M.R.S.A § 102(13)(C) and therefore is not subject to the Commission's general jurisdiction.

CST and TAM<sup>23</sup> both argued that the Commission should assert jurisdiction over RCC and then require compliance with all Commission Rules but both failed to explain the nexus between RCC gaining ETC status and a finding under section 102(13) that RCC was providing basic service. Generally speaking, however, the service RCC will provide as an ETC is the same as it provides today. There is nothing about our designation that changes the type of service being provided by RCC. We agree with the OPA that other than Chapters 290 and 294, we do not see any current issues involving RCC or wireless carriers that need to be addressed by our current rules. If, at some future time, a specific showing can be made that circumstances have changed significantly, we can revisit this decision.

Finally, with regard to the two remaining conditions contained in the Stipulation (establishment of a call placement service and a \$15.00 per month USF plan), we find that the record supports the benefits of such services to Maine consumers. While the terms of the Stipulation release the parties from their obligations under the Stipulation if the Commission fails to accept the Stipulation, we encourage RCC to follow through on the agreements embodied in the Stipulation. Rather than address the legal question of whether the Commission could order RCC to comply with the conditions at this time, we ask

<sup>&</sup>lt;sup>23</sup>TAM also argued that RCC should not be designated an ETC unless it also assumed carrier of last resort responsibilities in its service area. The FCC specifically rejected adding such a requirement for ETC designation. <u>Federal-State Joint Board on Universal Service</u>, CC Docket No. 96-45, First Report and Order, 12 FCC Rcd 8776, 8855 (1997).

RCC to notify the Commission within ten (10) of the date of this Order whether it intends to comply.<sup>24</sup> If RCC chooses not to comply, we may re-open the record for argument on these issues.

# ORDERED

Dated at Augusta, Maine, this 13<sup>th</sup> day of May, 2003.

BY ORDER OF THE COMMISSION

Dennis L. Keschl Administrative Director

COMMISSIONERS VOTING FOR:

Welch

Nugent Diamond

<sup>&</sup>lt;sup>24</sup>We would treat a statement that it intends to comply as consent to making such compliance a condition of this Order.

#### STATE OF MICHIGAN

#### BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of ALLTEL COMMUNICATIONS, INC.,
for designation as an eligible telecommunications Carrier pursuant to Section 214(e)(2) of the Communications Act of 1934.

At the September 11, 2003 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chair

Hon. Robert B. Nelson, Commissioner Hon. Laura Chappelle, Commissioner

#### OPINION AND ORDER

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#### HISTORY OF PROCEEDINGS

On April 14, 2003, ALLTEL Communications, Inc., (ALLTEL) filed an application seeking designation as an eligible telecommunications carrier (ETC) under Sections 214(e)(2) and 214(e)(6) of the federal Communications Act of 1934, as amended, 47 USC 214(e)(2) and 214(e)(6) (federal Act) and Sections 201 and 203 of the Michigan Telecommunications Act, MCL 484.2101 et seq. (MTA). If granted, designation as an ETC would permit ALLTEL to receive universal service support in Michigan.

Several parties petitioned to participate in the proceeding. On May 6, 2003, the Commission Staff (Staff) filed a notice of appearance. On May 21, 2003, CenturyTel of Michigan, Inc.,

CenturyTel Midwest-Michigan, Inc., CenturyTel of Northern Michigan, Inc., and CenturyTel of Upper Michigan, Inc., (CenturyTel) jointly filed a petition to intervene. Also on May 21, 2003, Hiawatha Telephone Company, Chippewa County Telephone Company, Midway Telephone Company, and Ontonagon County Telephone Company (Hiawatha) jointly petitioned to intervene. The Michigan Exchange Carriers Association, Inc., (MECA), a voluntary association of 33 small incumbent local exchange carriers (ILECs) in Michigan, also filed a petition. On May 28, 2003, AT&T Communications of Michigan, Inc., and TCG Detroit (AT&T) filed a notice of intent to participate.

On May 28, 2003, a pre-hearing conference was conducted by Administrative Law Judge

Mark E. Cummins (ALJ). ALLTEL, CenturyTel, MECA, AT&T, and the Staff attended. The

ALJ granted the petitions to intervene and ordered the parties to file their direct testimony by June

10, 2003 and rebuttal testimony by June 23, 2003. Cross-examination of witnesses was to take

place on July 7, 2003, with a briefing schedule to be determined thereafter. In order to meet the

180-day Federal Communications Commission (FCC) guideline for state commissions to act on

ETC applications, the Commission agreed to read the record in this proceeding.

Several parties filed testimony. ALLTEL filed the direct and rebuttal testimony of Lawrence J. Krajci, its Staff Manager of State Government Affairs. CenturyTel filed the direct and rebuttal testimony of Ted M. Hankins, its Director of State Government Relations. MECA filed the direct and rebuttal testimony of Robert W. Orant President and CFO of Hiawatha Communications, Inc. The Staff filed the direct testimony of Daniel J. Kearney, Supervisor of the Operations Section of the Commission's Telecommunications Division.

<sup>&</sup>lt;sup>1</sup> This date was later moved to July 8, 2003.

On July 8, 2003, the ALJ conducted an evidentiary hearing. All testimony was bound into the record by stipulation of the parties and cross-examination of witnesses was waived. ALLTEL, CenturyTel, MECA, and the Staff filed briefs and reply briefs on July 23 and August 1, 2003, respectively.

On July 25, 2003, ALLTEL filed a motion to strike portions of CenturyTel's reply brief.

ALLTEL contends that CenturyTel inappropriately raised arguments for the first time in its reply brief, thereby preventing ALLTEL an opportunity to respond.

II.

#### POSITIONS OF THE PARTIES

There are two issues in this proceeding. First is whether ALLTEL should be designated as an ETC for purposes of receiving universal service support. Second, if ALLTEL is granted ETC status by the Commission, for what service area(s) should ALLTEL's status be granted.

#### ALLTEL

ALLTEL argues that it meets the requirements for ETC designation under the federal Act.

ALLTEL states that it meets all the statutory and regulatory prerequisites for ETC designation and that designating ALLTEL as an ETC will serve the public interest. ALLTEL represents that once it receives its ETC designation, it plans to use the funding to speed the delivery of advanced wireless services to its customers. As an ETC, ALLTEL states that it will offer a basic universal service package to customers who are eligible for Lifeline and will provide service to any customer requesting service within its designated service area. ALLTEL further avers that it provides all the services supported by universal service mechanisms. ALLTEL says that it will

advertise the availability of the supported services and charges in a way that fully informs the general public throughout its designated service area.

ALLTEL argues that its application is in the public interest. ALLTEL asserts that granting it ETC status will help bring meaningful choice to Michigan customers who have few, if any, choices for local exchange service. ALLTEL further asserts that its ETC status will bring the benefits of competition to customers, increase choices, and lower rates. ALLTEL further notes that the FCC has determined that wireless providers may be designated as ETCs.<sup>2</sup> ALLTEL claims that its customers will benefit from having an expanded local calling area, making intrastate toll calls more affordable.

ALLTEL also requests that the Commission establish its service area for purposes of determining universal service support. ALLTEL specifically requests that it be granted ETC status for its entire licensed service area in Michigan. Attached to its application are exhibits that identify each of the requested areas by wire center. Where ALLTEL serves only a portion of a wire center, it requests ETC designation in that portion of the wire center where it provides service. For certain rural areas, ALLTEL requests that the Commission redefine the service area of several ILECs because ALLTEL only serves a portion of the ILECs' service areas.

#### **CenturyTel**

CenturyTel argues that ALLTEL's application must be denied. CenturyTel believes that ALLTEL's application does not meet the requirements for the granting of ETC status under

<sup>&</sup>lt;sup>2</sup> See, ALLTEL application, p. 9, citing, Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45, 12 FCCR 8776, 8858-59, ¶¶ 145-47 (1997).

Section 214(e), because granting ETC status to ALLTEL would not be in the public interest.<sup>3</sup>

CenturyTel asserts that ALLTEL has been successful at providing service without the need for universal service support. It argues that giving ALLTEL universal service funds would give ALLTEL an unearned windfall, would work to increase charges for Michigan customers, and will ultimately jeopardize the universal service support mechanism altogether.

CenturyTel claims that ALLTEL should not be granted ETC status because, as a wireless carrier, ALLTEL's costs are unrelated to landline costs from which universal service support is derived. CenturyTel also asserts that it is held to higher service standards and regulatory obligations than wireless carriers, which result in higher operating costs for CenturyTel. CenturyTel specifically objects to the fact that ALLTEL has lower costs than CenturyTel, but would receive the same universal service support. CenturyTel argues that granting ALLTEL ETC status would create an uneven playing field, biased against higher cost providers, and could actually reduce competition.

CenturyTel also expressed concern over the fact that wireless carriers are not subject to the same regulatory oversight as incumbent carriers. CenturyTel contends that while wireless carriers are seeking support from a regulatory cost recovery mechanism, the Commission has no regulatory oversight over these carriers to ensure that the monies are used to advance universal service. CenturyTel contends that this uneven playing field, and the fact that the benefits of granting wireless carriers ETC status do not exceed the costs, means that granting ALLTEL's application would not be in the public interest.

¹ In its reply brief, CenturyTel also asserts that ALLTEL's application is insufficient because ALLTEL does not provide "local usage" as required by federal law. CenturyTel's argument suggests that all wireless carriers in Michigan cannot meet the federal requirement because of the exclusion of mobile service from basic local exchange service. This Commission, however, has previously granted ETC status to several wireless carriers.

Century Tel also believes that it would be premature for the Commission to grant any ETC applications while the FCC is in the process of considering new rules for the granting of ETC status to competitive carriers. Century Tel suggests waiting until the FCC makes its pronouncements regarding any changes.

Furthermore, if the Commission decides to grant ALLTEL's application, then CenturyTel requests that ALLTEL's ETC status be conditioned on ALLTEL's compliance with regulatory safeguards to ensure a level competitive playing field with rural providers. CenturyTel also argues that allowing ALLTEL to have ETC status in only a portion of a rural ILEC's service area is contrary to the public interest, and that the Commission should not redefine CenturyTel's rural ILEC service area.

#### Hiawatha

Hiawatha believes that ALLTEL's application does not satisfy the requirements of granting ETC status and therefore should be denied. Hiawatha asserts that it provides rural telecommunications services and would be economically harmed if ALLTEL's application were granted. Hiawatha believes that universal service support is a scarce resource that is jeopardized by granting ETC status to providers like ALLTEL whose lower costs do not justify receiving the same level of support as rural carriers. Hiawatha also believes that granting ALLTEL ETC status would create an uneven competitive playing field for rural carriers. Hiawatha claims that wireless carriers given ETC status should be subject to the same service quality and reporting requirements as ILECs. Hiawatha also believes that ALLTEL should be required to serve the same areas as the ILECs and that the Commission should not redefine Hiawatha's service areas. Hiawatha also

<sup>\*</sup>See, Public Notice, Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission's Rules Relating to High-Cost Universal Service Support and the ETC Designation Process, FCC 03J-1, CC Docket No. 96-45 (February 7, 2003).

contends that in order for ALLTEL's application to satisfy the public interest requirement,

ALLTEL should have to demonstrate that the benefits of supporting multiple networks outweigh
the cost of supporting multiple networks.

#### **MECA**

MECA also opposes ALLTEL's application for designation as an ETC. MECA asserts that it and its members, many of whom provide service to rural areas of the state, will suffer from a loss of universal service support. MECA asserts that a loss of universal service funds will affect small rural telecommunications providers' ability to maintain and invest in the infrastructure needed to serve high-cost areas.

MECA argues that ALLTEL's application cannot be granted unless granting the application is in the public interest. MECA asserts that merely providing all universal service supported services does not mean that an applicant's application is in the public interest. MECA alleges that the further public interest finding should be based upon universal service purposes and principles MECA asserts that Congress, in placing this added requirement, did not believe that the public interest would always be served by encouraging competition in rural areas.

MECA claims that Congress did not intend universal service support to be a subsidy program. Rather, MECA argues, Congress intended universal service support to provide for cost recovery in order to promote infrastructure investment in high-cost rural areas where providing the same quality service at affordable rates comparable to urban areas is not suitable for carriers. MECA argues that without this support, high-cost investment would not have occurred in the past and will not occur in the future. MECA sees infrastructure investment as the primary goal of the universal service program.

Page 7 U-13765 MECA argues that the only providers of high quality, facilities-based services throughout their respective service areas are the rural ILECs. MECA claims that once a rural ILEC loses the ability or incentive to continue investing in its network, then rural areas may be deprived of affordable, high quality telecommunications services. MECA asserts that lack of sufficient funding will also affect the deployment of advanced services to consumers, such as schools, libraries, and health care facilities.

Consequently, the granting of ETC status to competitive carriers in areas served by rural carriers, MECA contends, must be properly managed to foster the goals of the federal Act. MECA claims that if the overall demand for funding grows to an unsustainable level, then support payments will be frozen or curtailed, resulting in serious operating issues for many rural telephone companies. MECA claims that this would result in reductions in service quality, higher rates, and perhaps even financial failure of rural companies that serve as the "lifeline" for many remote customers. MECA argues that the proliferation of "uneconomic competition" in rural areas could jeopardize rural telecommunications services altogether.

MECA also asserts that state commissions have placed far too great an emphasis on the benefits of competition when deciding ETC applications for rural service areas. MECA claims that subsidized competition does not serve the public interest. MECA believes that this over-emphasis has been to the detriment of ensuring that all consumers will retain and gain access to high quality, affordable telecommunications services, including advanced services, on a comparable basis to those available in urban areas. Because of this, MECA believes that the Commission must establish a set of principles to guide its decisions on ETC applications affecting rural areas.

To assist the Commission in establishing this set of principles, MECA offers its own. First, rural consumers should receive access to affordable, high quality telecommunications and information services, including advanced services that are reasonably comparable to those in urban areas and at reasonably comparable prices. Second, high-cost support should not be used as an incentive for uneconomic competition in areas served by rural carriers. Third, universal service funds are a scarce national resource that telephone companies must carefully manage to serve the public interest. Fourth, rural universal service support reflects the difference between the cost of serving high-cost rural areas and the rate levels mandated by policymakers. Fifth, the public interest is served only when the benefits from supporting multiple carriers exceed the costs of supporting multiple networks. Sixth, in areas where costs of supporting multiple networks exceed the public benefits from supporting multiple carriers, the public interest dictates providing support to a single carrier that provides critical telecommunications infrastructure. Seventh, the cost of market failure in high-cost rural Michigan could be severe.

In addition to the guiding set of public interest principles, MECA believes the Commission should create a standard set of minimum qualifications, requirements, and policies to be applied when considering ETC applications for rural service areas MECA believes that using such a template would help the Commission determine whether the public interest would be served by granting an application. MECA also asserts that such a guideline would improve the long-term viability of the universal service fund because it believes only the most qualified carriers that are capable of, and committed to, being "true providers" of universal service should receive the ETC designation.

To assist the Commission, MECA offers the following qualifications and requirements that it believes the Commission should adopt when considering ETC applications: 1) A carrier must

demonstrate its ability and willingness to provide all supported services throughout the service area. 2) To fulfill the advertising requirement, an ETC must emphasize its universal service obligation to offer service to all consumers in the service area. 3) A carrier must have formal arrangements in place to provide service where facilities have yet to be built. 4) A carrier must have a plan for building out its network once it receives ETC status and must make demonstrative progress toward achieving its plan to retain its status. 5) A carrier must demonstrate that it is financially stable.

In addition to public interest principles, and minimum qualifications and requirements, MECA urges adoption of the following policies that it believes the Commission should adhere to when reviewing ETC applications involving rural areas: 1) ETC designations in rural areas should be made at the study area level (an ILEC's entire service territory within one state). 2) The Commission should ensure that competitive ETCs will be capable of providing high-quality service to all customers in the service area should the rural ILEC find it necessary to relinquish its own ETC designation. 3) Any service quality standards, reporting requirements, and customer billing requirements established by the Commission should apply equally to all ETCs in the state.

4) The Commission should retain the authority to decertify any ETC that is not meeting any of the Commission's qualifications and requirements.

In short, MECA does not believe that granting ALLTEL's application would be in the public interest. MECA also supported effering the decision on ALLTEL's application until the Federal-State Joint Board clarifies the process for designating ETCs.

## Staff

The Staff's testimony references background material that it believes will assist the Commission in determining whether granting ALLTEL's application would be in the public

Page 10 U-13765 interest. In so doing, the Staff directs attention to portions of the MTA and the federal Act that support the development and the use of competition to make available quality telecommunications services at prices that are just, reasonable, and affordable even in rural, high-cost areas. The Staff also presents a number of questions for the Commission's reflection. The Staff would like more guidance as to the definition of "public interest." The Staff suggests that healthy competition is the most significant factor in a public interest analysis, followed closely by choice and reasonable rates. In the end, the Staff sees no reason to further delay or deny ALLTEL's ETC designation.

#### III.

#### DISCUSSION

#### ETC Designation

Pursuant to 47 USC 214(e)(2), the Commission may designate more than one carrier in a rural area as an ETC if the Commission finds doing so consistent with the public interest, convenience, and necessity. The parties to this proceeding opposing ALLTEL's application argue that granting ALLTEL's application is not in the public interest. The Commission disagrees. On numerous occasions, the Commission has found that competition can be advantageous to the citizens of this state. In this case, designating ALLTEL as an ETC is in the public interest because it is likely to promote competition and provide benefits to customers in rural and high-cost areas by increasing customer choice, while promoting innovative services and new technologies, and encouraging arrordable telecommunications services. Further, ALLTEL provides service where there are few, if any, competitive local exchange carriers.

The Commission disagrees with the significance of the numerous arguments advanced by the opposing parties. To the extent that the opposing parties claim that wireless service is inferior to landline service, the Commission responds that customers should not be denied an opportunity to

determine which of these services best meets their needs. In response to the argument that wireless service providers are not subject to the same regulations designed to protect customers, the Commission finds sufficient protection for customers in their right to choose not to use wireless service and to choose from whom to take service. To the extent that the opposing parties are concerned about the effects on themselves of competition from wireless carriers, the Commission does not agree that the public interest requires that they be protected from competition. Moreover, concerns over the effects of competition on the universal service mechanism are better addressed by the FCC, which is responsible for disbursing the federal universal service funds.

There is ample precedent in support of a wireless carrier's designation of ETC status. On at least three prior occasions, this Commission has granted ETC status to wireless carriers. In addition, numerous ETC proceedings involving competitive carriers, including wireless carriers, have taken place at the FCC and before other state commissions with the competitive carrier ultimately being granted ETC status. The Commission provided parties an opportunity to voice their concern about the granting of ETC status to a wireless carrier by conducting an evidentiary hearing. Virtually every argument raised by the parties in opposition to ALLTEL's application, however, has been addressed previously. No new information was brought to the Commission's

<sup>&</sup>lt;sup>5</sup> See, the August 26, 2003 order in Case No. U-13714, the November 20, 2001 order in Case No. U-13145, and the December 6, 2002 order in Case No. U-13618.

<sup>&</sup>lt;sup>6</sup> See, e.g., RCC Minnesota, Inc. et. al. Request for Designation as Eligible Telecommunications Carrier, Order, Maine Public Utilities Commission Docket No. 2002-344 (May 13, 2003); In the Matter of Federal State Joint Board on Universal Service Cellular South License Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama, Memorandum Opinion and Order, CC Docket No. 96-45, DA 02-3317 (rel. Dec. 4, 2002); In the Matter of Federal State Joint Board on Universal Service RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunication Carrier Throughout its Licensed Service Area in the State of Alabama, Memorandum Opinion and Order, CC Docket No. 96-45, DA 02-3181 (rel. Nov. 2, 2002).

attention that would persuade the Commission that designating a competitive carrier as an ETC in an area served by a rural ILEC would be contrary to the public interest.

Furthermore, the Legislature has decided that the Commission should not regulate wireless service. For that reason, the Commission must also decline to adopt the conditions proposed, such as requiring ALLTEL to assume carrier of last resort responsibilities, which would require that the Commission regulate wireless service. Consistent with prior designations, however, the Commission reserves the right to conduct audits as needed to determine that the funds are used for permitted purposes.

The Commission declines CenturyTel's and MECA's recommendation to defer its determination on ALLTEL's application until after the Federal-State Joint Board provides further clarity on ETC designations. At this point, there is no time frame in which the Joint Board will act. The Commission, however, has been urged by the FCC to act upon ETC applications within 180 days and the end of that period with respect to this application is fast approaching. The Commission believes the better course of action is to act upon ALLTEL's application within the desired timeframe and take recommendations of the Federal-State Joint Board into account when deciding future cases.

## Service Area

ALLTEL also requests that the Commission establish a "service area" for purposes of determining universal service support. The federal Act defines the term "service area" to be a "geographic area established by a State commission for the purpose of determining universal service obligations and support mechanisms." 47 USC 214(e)(5). As stated above, ALLTEL requests that its licensed service area be the designated service area for universal service support.

Additionally, ALLTEL requests that the Commission redefine the service areas of rural ILECs where it cannot provide service to the entire service area of these companies.

CenturyTel, Hiawatha, and MECA oppose ALLTEL's service area proposal. They argue that ALLTEL must serve the same service area as the rural ILEC. CenturyTel contends that redefining a rural carrier's service area acts as a disincentive for an additional ETC to serve the most rural parts of a relevant study area. CenturyTel contends that the goal of universal service would be better served by requiring "ETCs to expand their horizons." CenturyTel Brief, p. 17 CenturyTel is also concerned that if additional ETCs are not required to serve a rural ILEC's entire study area, then there is a greater risk of "cream-skimming," where the additional ETC can choose to provide service to lower cost customers without being subject to providing service to attendant higher cost customers while receiving the same level of universal service support as the rural ILEC. MECA also raises concerns about what it described as significant administrative burdens for an ILEC as a result of study area changes. MECA describes how an ILEC's accounting and auditing procedures are built around their existing study areas.

The Commission appreciates the concerns raised by CenturyTel, Hiawatha, and MECA, but declines to accept the proposal that the wireless carrier's service area should encompass the ILEC's entire study area. In granting ETC status to RFB Cellular, Thumb Cellular, and NPI-Omnipoint Wireless, LLC, the Commission did not require the wireless carrier to provide service to the entire study area of the rural ILEC

The Commission, however, also has concerns with ALLTEL's proposal to redefine the service areas of certain ILECs. The study areas of rural ILECs have existed for many years and many accounting and other administrative tasks are based upon those study areas.

The Commission is also sensitive to the "cream-skimming" issues that could exist if every ETC applicant is able to carefully craft its own desired service area. Consequently, the Commission has decided to delineate service areas for purposes of universal service support by exchanges. In so doing, the Commission finds that the "cream-skimming" concerns are alleviated because ALLTEL has not specifically picked the areas in which it will serve, but instead the areas were defined in the FCC's wireless licensing process. Additionally, exchanges tend to encompass many types of customers, including rural and high-cost customers. The Commission is persuaded that ALLTEL is not targeting any specific area or that serving any of the partial study areas would result in a windfall due to service to a highly-populated area. Much of the area covered by ALLTEL's wireless carrier license is in very rural parts of Michigan. The Commission is also convinced that designating service areas utilizing entire exchanges will minimize the administrative burden on rural telephone companies to calculate costs at something other than a study area level. This approach will require affected ILECs to disaggregate into service areas that are coterminous with existing telecommunications boundaries for which costs are already calculated

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 et seq.
- b. ALLTEL should be designated as an ETC for the purpose of receiving federal universal service funds.
  - c. ALLTEL's designation as an ETC is in the public interest.

- d. ALLTEL's service area for purposes of determining universal service obligations and support mechanisms should be coterminous with established exchanges.
- e. ALLTEL should be directed to file in this docket (and serve upon the other parties) a listing of the exchanges where it currently provides service or intends to provide service under its license and for which it wishes to receive universal service support and is able to meet universal service obligations.
- f. The granting of ALLTEL's ETC status should be conditioned upon the Commission's reservation of its right to audit all expenditures of these universal service funds.
- g. ALLTEL's ETC designation should be subject to the annual Commission re-certification process. ALLTEL should be directed to contact the Staff regarding the 2004 re-certification process prior to September 17, 2003.
  - h. ALLTEL's August 25, 2003 motion to strike should be denied.

### THEREFORE, IT IS ORDERED that:

- A. ALLTEL Communications, Inc., is designated an eligible telecommunications carrier for the purpose of receiving federal universal service funds.
- B. ALLTEL Communications, Inc.'s, service area for purposes of determining universal service obligations and support mechanisms is to be coterminous with established exchanges.
- C. ALLTEL Communications, Inc., is directed to file in this docket (and serve upon the other parties) a listing of the exchanges where it currently provides service or intends to provide service under its license and for which it wishes to receive universal service support and is able to meet universal service obligations.

D. ALLTEL Communications, Inc.'s, eligible telecommunications carrier designation is conditioned upon the Commission's reservation of its right to audit all expenditures of these universal service funds.

E. ALLTEL Communications, Inc.'s eligible telecommunications carrier designation is subject to the annual Commission re-certification process. ALLTEL is directed to contact the Commission Staff regarding the 2004 re-certification process prior to September 17, 2003.

F. ALLTEL Communications, Inc.'s August 25, 2003 motion to strike is denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

	/s/ J. Peter Lark
	Chair
(SEAL)	
	/s/ Robert B. Nelson Commissioner
	/s/ Laura Chappelle
By its action of September 11, 2003.	Commissioner
/s/ Robert W. Kehres Its Acting Executive Secretary	
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Page 17 U-13765 D. ALLTEL Communications, Inc.'s, eligible telecommunications carrier designation is conditioned upon the Commission's reservation of its right to audit all expenditures of these universal service funds.

E. ALLTEL Communications, Inc.'s eligible telecommunications carrier designation is subject to the annual Commission re-certification process. ALLTEL is directed to contact the Commission Staff regarding the 2004 re-certification process prior to September 17, 2003.

F. ALLTEL Communications, Inc.'s August 25, 2003 motion to strike is denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

Chair

Commissioner

Commissioner

By its action of September 11, 2003.

Its Acting Executive Secretary

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### BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer Marshall Johnson Phyllis A. Reha Gregory Scott Chair Commissioner Commissioner Commissioner

In the Matter of the Petition of RCC Minnesota, Inc. and Wireless Alliance, LLC for Designation as an Eligible Telecommunications Carrier (ETC) Under 47 U.S.C. § 214(e)(2)

ISSUE DATE: July 31, 2003

DOCKET NO. PT-6182,6181/M-02-1503

ORDER GRANTING CONDITIONAL APPROVAL AND REQUIRING ADDITIONAL FILINGS

### PROCEDURAL HISTORY

On September 10, 2002, RCC Minnesota, Inc. and Wireless Alliance, LLC, together as the affiliates of Rural Cellular Corporation providing service in Minnesota (collectively RCC) submitted a Petition for Designation as an Eligible Telecommunications Carrier (ETC). RCC requested that the Commission designate it as eligible to receive all available support from the federal Universal Service Fund (USF), including support for rural, insular and high-cost areas and low income customers.

RCC made a corrected filing on September 16, 2002, upon receipt of a Commission Notice of Deficient Filing of Protected Data.

On November 4, 2002, the Commission issued its ORDER REQUIRING ADDITIONAL FILING, VARYING TIME PERIOD AND NOTICE AND ORDER FOR HEARING. The matter was referred to an Administrative Law Judge (ALJ) for a contested case proceeding.

On November 18 and 19, 2002, RCC made supplemental filings to its petition, pursuant to the Commission's November 4, 2002 Order.

On April 21, 2003, the ALJ filed her Findings of Fact, Conclusions of Law and Recommendation. The ALJ recommended granting RCC preliminary designation as an ETC in the proposed service area in Minnesota, with final approval contingent upon a satisfactory compliance filing. The record closed on April 8, 2003.

<sup>&</sup>lt;sup>1</sup> Pursuant to Section 214(e)(2) of the Communications Act of 1934, as amended (Act), 47 U.S.C, § 214 (e)(2) and Section 54.201 of Federal Communications Commission's (FCC) rules, 47 C.F.R. § 54.201.

Exceptions to the ALJ's report were filed by RCC, Citizens Telecommunications Company of Minnesota, Inc. (Citizens), and Minnesota Independent Coalition (MIC) on May 2, 2003.

Replies were filed by the Department of Commerce (DOC) on May 8, 2003 and by RCC on May 12, 2003.

On June 5, 2003, this matter came before the Commission.

## FINDINGS AND CONCLUSIONS

# I. Historical Background

The federal Telecommunications Act of 1996 (the Act)<sup>2</sup> is designed to open the nation's telecommunications markets to competition. Its universal service provisions are designed to keep competition from driving rates to unaffordable levels for "low-income consumers and those in rural, insular, and high cost areas" by subsidizing those rates. Only carriers that have been designated ETCs are eligible to receive these subsidies.<sup>4</sup>

Traditionally rural rates, which otherwise would have reflected the higher costs of serving sparsely-populated areas, were subsidized explicitly by payments from federal universal service funds and implicitly by requiring carriers to average rural and urban costs when setting rates.<sup>5</sup>

Competition calls into question the continued viability of subsidizing rural rates through averaged pricing. While no one was sure how competition would develop, many credible scenarios suggested that it would first appear in urban areas, for two reasons: First, urban areas cost less to serve. Second, urban rates are often inflated to finance rural subsidies, a cost that new entrants without rural customers would not incur. Together, these factors made urban markets the logical starting point for new entrants seeking to underprice the incumbents. This urban-first scenario could threaten the affordability of telecommunications services in rural, insular and high-cost areas.

In addition, to promote access to telecommunications by people with low income, Congress provided programs to subsidize both the cost of initiating residential telephone service (Link Up<sup>6</sup>) and ongoing residential telephone bills (Lifeline<sup>7</sup>).

<sup>&</sup>lt;sup>2</sup> Pub. L. No 104-104,110 Stat.56, codified throughout title 47, United States Code.

<sup>&</sup>lt;sup>3</sup> 47 U.S.C. § 254(b)(3).

<sup>&</sup>lt;sup>4</sup> 47 C.F.R. § 54.201(a)(1).

<sup>&</sup>lt;sup>5</sup> In the Matter of Federal-State Joint board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, CC Docket Nos. 96-45, 00-256 Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking, 16 FCC Rcd 11244, 11251, ¶ 13 (2001).

<sup>&</sup>lt;sup>6</sup> 47 C.F.R. § 54.411.

<sup>&</sup>lt;sup>7</sup>47 C.F.R. § 54.401.

Congress directed the Federal Communications Commission (FCC) to work with the states through a Federal-State Joint Board to overhaul existing universal service support systems. The Act required the FCC to determine which services qualified for subsidies. It authorized the states to determine which carriers qualified for universal service funding. The Act's term for these carriers was "eligible telecommunications carriers" (ETCs).

## II. The Legal Standard

Applications for ETC status are governed by federal and state law.<sup>10</sup> The Act's § 214 requires an ETC to offer certain designated services throughout its ETC-designated service area, use its own facilities or a combination of its own facilities and resale of another carrier's service in providing these services, and advertise the availability and price of these services.<sup>11</sup> While the list of designated services may change over time,<sup>12</sup> FCC rule § 54.101(a) currently designates the following services:

- voice grade access to the public switched network
- local usage
- touch-tone service or its functional equivalent
- single-party service
- access to emergency services, including 911 and enhanced 911
- access to operator services
- access to interexchange services
- access to directory assistance
- toll limitation for qualifying low-income customers

This Commission has the responsibility for designating ETCs in Minnesota except where it lacks jurisdiction over an applicant.<sup>13</sup> The Commission evaluates an application based on the criteria of the Act, the FCC, and the state itself.<sup>14</sup> State-imposed criteria must be "competitively neutral" so as not to favor incumbents, competitors, or any particular technology.<sup>15</sup>

<sup>&</sup>lt;sup>8</sup> 47 U.S.C. § 254.

<sup>&</sup>lt;sup>9</sup> 47 U.S.C. § 214(e).

<sup>&</sup>lt;sup>10</sup> 47 U.S.C. §§ 254, 214; 47 C.F.R. § 54.101; Minn. Rules parts 7811.1400 and 7812.1400.

<sup>&</sup>lt;sup>11</sup> 47 U.S.C. § 214(e)(1).

<sup>&</sup>lt;sup>12</sup> 47 U.S.C. § 254(c)(1).

<sup>&</sup>lt;sup>13</sup> 47 U.S.C. § 214(e)(6).

<sup>&</sup>lt;sup>14</sup> See *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 417-18 (5th Cir. 1999) (state may impose own criteria, in addition to federal criteria, when evaluating requests for ETC status).

 $<sup>^{15}</sup>$  47 U.S.C. § 254(b)(7); In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 Report and Order, 12 FCC Rcd 8776, 8801-03 ¶¶ 46-51 (1997).

The Commission must grant ETC status to any qualified applicant, provided that the applicant is not seeking to serve exchanges in which the incumbent telephone company is a rural telephone company. For these areas the state commission must first make a finding that designating more than one carrier is in the public interest. <sup>16</sup> This requirement reflects Congressional concern that some thinly-populated areas might not be able to support more than one carrier.

# III. RCC's Application

RCC is a Commercial Mobile Radio Service (CMRS) carrier licensed to provide cellular service in over 30 counties in Minnesota, north of the twin cities. RCC has a controlling interest in Wireless Alliance, a limited liability company that is authorized to provide personal communications services (PCS) in the Minneapolis and St. Cloud basic trading areas.

RCC stated that it is a full-service wireless carrier which offers all of the services supported by the federal universal service fund (USF) throughout its licensed service area utilizing its own facilities, including its own wireless antennas, towers, and mobile switching offices.

RCC intends to provide universal service through both its conventional cellular offerings, which use a .6-watt handheld phone, and its basic unbundled universal service offering (BUUSO). The BUUSO uses a 3-watt wireless local loop unit that simulates a dial tone and provides the ability to connect to an external antenna. It will operate on RCC's wireless network in the same way as any other wireless telephone.

The BUUSO will include unlimited local usage for calls made from the customer's local calling area to numbers located within the local calling area. The local calling area for customers using BUUSO would be approximately equivalent to the geographic area of the school district serving the customer's billing address. The BUUSO service will be offered at \$14.99 per month and requires the use of a home wireless terminal. RCC has not yet determined what it intends to charge customers for the wireless local loop equipment or for installation of the wireless local loop.

Also, RCC has committed to use all universal service funds it receives to improve its coverage and increase the availability of services to unserved or under-served areas. RCC has proposed building 15 cell sites in high cost areas that would otherwise not be high on the list for capital expenditures. In addition RCC anticipates that the facilities it will use to deliver the nine supported services will be able to deliver wireless Internet access, wireless high-speed Internet access, and other new services using advanced technologies.

RCC is requesting ETC designation for the non-rural local exchange carrier (LEC) exchanges within RCC's service area as well as rural study areas that RCC serves both in part and in their entirety. RCC is not seeking designation as an ETC in several areas in Northern Minnesota that are currently considered unserved territory and for which no incumbent local exchange carrier (ILEC) has been designated an ETC.

<sup>&</sup>lt;sup>16</sup> 47 U.S.C. § 214(e)(2). Each grant of ETC status must be consistent with the public interest, convenience and necessity. Minn. Rules part 7811.1400, subp. 2; 7812.1400, subp. 2. "Rural telephone company" is defined at 47 U.S.C. § 153(47).

#### IV. Commission Action

Having reviewed the record and provided the parties with an opportunity to be heard, the Commission finds the analysis of the ALJ persuasive. Therefore, the Commission will accept, adopt, and incorporate herein the ALJ's Findings of Fact, Conclusions of Law and Recommendation, including the recommendation to grant preliminary ETC designation to the Company. The Commission will grant final approval upon a satisfactory compliance filing designed to address concerns identified by the ALJ and the parties.

The Commission's analysis and the requirements of the compliance filing will be summarized below.

# V. Basic Requirements to Become an ETC under 47 U.S.C. § 214

# A. Services Designated for Support

The ALJ found that no party contended that RCC failed to provide the nine supported services set forth in 47C.F.R § 54.101(a) and that RCC established that it is capable of offering the supported services throughout the proposed ETC service area. It will do so by installing new cell sites, using repeater technology, high gain or mini antennas, adjusting technical parameters at existing cell sites and reselling the service of other carriers.

# B. Advertising the Supported Services

RCC indicated that upon designation it intends to advertise in newspapers within its designated service areas and in bill inserts to existing customers.

The DOC argued that RCC has not provided sufficient detail regarding its specific advertising plans and should be required to fully disclose its advertising plans.

The ALJ agreed that the DOC's position was reasonable and noted that RCC did not object to providing the requested information in a compliance filing. The ALJ found that contingent upon the adequacy of its compliance filing, RCC demonstrated that it will advertise the supported services.

#### C. Commission Action

The Commission agrees with the ALJ and will adopt the ALJ's conclusion that RCC satisfies the requirements that it provide the designated supported services and that it will be using some of its own facilities. The Commission will require RCC to make a compliance filing disclosing its advertising plans before the Commission makes a final determination on qualification.

### VI. The Public Interest

## A. The Legal Standard

While the Act generally requires a state commission to designate all qualifying applicants as ETCs, that is not true for areas served by rural telephone companies. For those areas, a state commission must first make a finding that designating more than one ETC would be in the public

interest.<sup>17</sup> Since RCC seeks ETC designation for areas served by rural telephone companies, the Commission must determine whether granting the Company's petition would be in the public interest.

When making the public interest determination the Federal Communications Commission (FCC) has considered 1) whether customers are likely to benefit from increased competition, 2) whether designation of an ETC would provide benefits not available from incumbent carriers, and 3) whether customers would be harmed if the incumbent carrier exercised it option to relinquish its ETC designation. <sup>18</sup> But states may add their own criteria, so long as they do not regulate the entry or rates of a CMRS provider. <sup>19</sup>

MIC and Citizens argued that the public interest standard requires consideration of additional factors, including the affordability of RCC's services and the effect of RCC's ETC status on the federal universal service fund. These will be addressed below.

## B. The FCC Standard

# 1. The ALJ's Findings

The ALJ analyzed the public interest issue using the standards set by the Federal Communications Commission (FCC) and concluded that granting ETC status to RCC would promote the public interest.

The ALJ concluded that subject to RCC making a satisfactory compliance filing as described below, the record demonstrates that consumers would receive the usual benefits of competition. RCC would offer consumers a choice of providers, features, local calling areas, usage amounts and prices. Further, increased investment in rural infrastructure, as committed to by RCC, will improve access to emergency services and provide access to new and innovative services. Finally, the ALJ found that no ILEC will lose high-cost universal service support as a result of a competitor's designation as an ETC. There was no evidence to support the claim that an ILEC would likely relinquish its carrier of last resort obligations.

The ALJ also concluded that there was no evidence that the designation of RCC would harm consumers or that the local service market in any exchange was insufficient to support competitive entry and that there was no reason, in this record, to deprive consumers in northern Minnesota of the potential benefits of competition.

<sup>&</sup>lt;sup>17</sup> 47 U.S.C. § 214(e)(2).

<sup>&</sup>lt;sup>18</sup> In the Matter of Federal State Joint Board on Universal Service, RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama, CC Docket No. 96 45, DA 02-3181, Memorandum Opinion and Order, 17 FCC Rcd 23532, 23540-42, ¶¶ 22-25 (2002).

<sup>&</sup>lt;sup>19</sup> See Texas Office of Public Utility Counsel, supra.

The ALJ, however, recognized the concern expressed by the DOC and MIC that RCC has not disclosed all the terms and conditions of its BUUSO offering, but has only disclosed the recurring rate of \$14.99. The ALJ found that the BUUSO and the 3-watt equipment that goes with it are critical to RCC's ability to provide service throughout its designated service area. Without it, the ALJ found the RCC cannot compete effectively for local exchange service because the coverage for conventional .6-watt phones is insufficient to provide reliable service. The ALJ found that the availability of this equipment to all consumers goes directly to the public interest issue of whether consumers are likely to receive the benefits of increased competition.

The ALJ accepted the DOC's recommendation that final approval of RCC as an ETC should be contingent on an adequate compliance filing that discloses all rates, terms, and conditions applicable to the BUUSO, including customer premise equipment options and charges, and installation charges.

#### 2. RCC's Position

RCC stated its commitment to make a compliance filing that details the rates, terms and conditions applicable to the BUUSO rate plan, including the options and charges for the wireless local loop equipment (WLL).

However, RCC took exception to the conclusion that the price charged by RCC for the wireless local loop (WLL) should be considered in determining whether RCC qualifies for ETC designation. RCC indicated that it would offer a purchase option for the WLL equipment for customers choosing the BUUSO plan on a month to month basis, a discounted purchase option for those customers choosing BUUSO for an extended contract period and a lease option of \$5.00 per month for the lease of WLL equipment. Customers can also purchase WLL equipment on their own.

## C. Commission Action

The Commission finds the ALJ's reasoning persuasive and concurs in and adopts her conclusion that subject to a satisfactory compliance filing on rates, terms and conditions applicable to BUUSO, including equipment and installation charges, RCC meets the public interest standard. Full disclosure of BUUSO terms will enable the Commission to determine whether RCC will be in a position to compete effectively for local exchange service and whether its ETC designation would likely result in consumers benefitting from increased competition.

Further, the Commission will also direct the Company to file a tariff with terms and rates for the BUUSO, with Lifeline and Link-Up and other services which may be added to a universal service offering.

## D. Additional Factors

#### 1. Affordability

The ALJ considered MIC's argument that the majority of RCC's mobile plans do not advance the universal service goal of providing local service at affordable rates. The ALJ determined that the Federal Act requires that a carrier offer the supported services, not that every service plan provide for unlimited local service or be priced comparably to the Incumbent Local Exchange Carrier's (ILEC's) rate for local service.

### 2. Effect on Universal Service Fund

The ALJ also considered MIC's argument that the costs of designating RCC as an ETC are excessive when compared to the likely benefits. The ALJ noted the FCC's position that arguments on the financial impact on the universal service fund are not relevant in a proceeding to designate a particular carrier. The ALJ determined that even if such arguments were relevant, designation of RCC as an ETC would have minimal impact on the federal fund and would not constitute a public cost that would outweigh the benefits of competition.

## 3. Effect on Competition

MIC argued that, based on line counts, RCC is successfully competing and does not need universal service subsidies to compete. The ALJ, however, found that this was not evidence of competition for local service.

Citizens argued that RCC's customers have both conventional cell phones and land lines and designating RCC as an ETC will not enhance competition, but it will just increase the number of households that have both cellular and land lines. The ALJ, however, found that the evidence demonstrated that RCC should be able to compete for basic service and this will enable customers to choose between land lines and wireless phones for local service.

MIC recommended that RCC's designation, if granted, should be limited to BUUSO because other cellular plans fail to provide local service. The ALJ found that there was no legal basis for limiting designation to one service plan.

# 4. Service Quality Issues

The DOC recommended that RCC be required to make a compliance filing disclosing its customer service and dispute resolution policies, network maintenance policies with procedures for resolving service interruptions, requests for service and any customer remedies offered as well as billing and payment and deposit policies. RCC did not oppose the compliance filing requested by the DOC.

Citizens raised concerns that RCC has not committed to any time frames to provide service to requesting customers and argued that the Commission should impose a specific standard on RCC related to customer requests for service.

### E. Commission Action

The Commission concurs in and adopts the ALJ's conclusions on the above issues and agrees that a compliance filing will provide the additional information required to make a final determination on whether RCC meets the public interest standard. The compliance filing should include RCC's customer service agreement with customer service and dispute resolution policies; network maintenance policies with procedures for resolving service interruptions and any customer remedies; billing and payment policies; and deposit policies. This information will enable the Commission to evaluate service quality issues when considering the public interest standard.

Further, the Commission will also require RCC to make a compliance filing providing the information generally required from ETCs in order for the State to certify the use of high cost funds (the annual certification). Finally, the Company shall include a statement of its understanding of its federal obligations regarding its service area.

Finally, the Commission, in the Midwest Wireless Order,<sup>20</sup> required the same disclosures from Midwest Wireless as required herein. The Commission continues to see the necessity for including these items in the compliance filing and will do so. All of the information required in the compliance filing will enable the Commission to better determine whether granting this petition is in the public interest.

# VII. Service Area Disaggregation

## A. The Legal Standard

A carrier must offer and advertise the required basic services throughout any "service area" for which the carrier is designated an ETC. While state commissions establish service area boundaries, those boundaries typically coincide with the service territory boundaries or exchange area boundaries of incumbent landline carriers. The Act defines "service area" as:

a geographic area established by a State commission ... for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c) of this title, establish a different definition of service area for such company.<sup>21</sup>

For rural telephone companies, the Act established a default definition of "study area" that comprised the company's entire service territory within a state. This default definition assigns all of a rural telephone company's exchanges to one large service area.

Large service areas pose an obstacle to carriers seeking ETC status. The FCC concluded that:

service areas should be sufficiently small to ensure accurate targeting of high cost support and to encourage entry by competitors.... [L]arge service areas increase start-up costs for new entrants, which might discourage competitors from providing service throughout an area because start-up costs increase with the size of a service area and potential competitors may be discouraged from entering an area with high start-up costs. As such, an unreasonably large service area effectively could prevent a potential competitor from offering the supported services, and thus would not be competitively neutral, would be inconsistent with section 254, and would not be necessary to preserve and advance universal service....

<sup>&</sup>lt;sup>20</sup> In the Matter of the Petition of Midwest Wireless Communications, LLC, for Designation as an Eligible Telecommunications Carrier (ETC) Under 47 U.S.C. § 214(e)(2), Docket No. PT-6153/AM-02-686, ORDER GRANTING CONDITIONAL APPROVAL AND REQUIRING FURTHER FILINGS, March 19, 2003.

<sup>&</sup>lt;sup>21</sup> 47 U.S.C. § 214(e)(5); 47 C.F.R. § 54.207.

[I]f a state adopts a service area that is simply structured to fit the contours of an incumbent's facilities, a new entrant, especially a CMRS provider, might find it difficult to conform its signal or service area to the precise contours of the incumbent's area, giving the incumbent an advantage....<sup>22</sup>

To address these problems, the Act authorized the states and the FCC to agree to re-define an incumbent's service area, dividing the territory into multiple areas for universal service purposes. In considering whether to disaggregate a rural telephone company's service territory, the state and the FCC must consider three factors identified by the Joint Board:<sup>23</sup> 1) the risk of "cream skimming," 2) the regulatory status accorded rural telephone companies under the 1996 Act, and 3) any additional administrative burdens that might result from the disaggregation.<sup>24</sup>

A state may disaggregate a non-rural telephone company's service area at its own discretion. But a rural telephone company's service area may not be disaggregated without the mutual consent of the state and the FCC.<sup>25</sup>

## B. RCC's Proposal

The FCC has authorized RCC to provide CMRS throughout a portion of northern Minnesota. The Company is seeking ETC designation for its entire service area except in unassigned areas for which no ETC has yet been assigned.

Specifically, RCC requested ETC designation for the following:

- the non-rural local exchange carrier (LEC) exchanges within RCC's service area.
- the rural study areas that RCC serves in their entirety.
- the rural study areas RCC does not serve in their entirety.

RCC requested that the Commission redefine the service areas of the rural ILECs in the territory in which it operates to conform to its licensed service area. It proposed that these areas be redefined so that each wire center is a separate service area and RCC's service area be defined consistent with those wire centers. Where RCC serves only a portion of a wire center, RCC's service area would be the portion of the wire center which it serves.

<sup>&</sup>lt;sup>22</sup> USF First Report and Order at ¶¶ 184-85, footnotes omitted [discussing non-rural service areas].

<sup>&</sup>lt;sup>23</sup> 47 C.F.R. § 54.207(c)(1)(ii).

<sup>&</sup>lt;sup>24</sup> See *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 12 FCC Rcd 87, 179-80, ¶¶ 172-74 (1996) (Joint Board Recommendation).

<sup>&</sup>lt;sup>25</sup> 47 C.F.R. § 54.207(c).

RCC is seeking disaggregation below the exchange level in the following exchanges: Benton Cooperative Telephone Company's Foreston and Ramey exchanges, Citizens Telephone Company's Wyoming exchange, MidState Telephone Company's Murdock exchange, and Sherburne County Rural Telephone Company's Glendorado exchange.

# C. The ALJ's Findings

The ALJ applied the three factors set forth by the Joint Board for a state to consider when evaluating disaggregating a rural telephone company's service territory: 1) the risk of cream skimming, 2) the regulatory status accorded the rural telephone companies, and 3) any additional administrative burdens that might result from disaggregation. The ALJ concluded that there was no evidence that RCC was attempting to cream-skim the low cost areas of these exchanges, nor was there any evidence that disaggregation would impose any significant additional administrative burden or affect the special regulatory status of any rural telephone company. The ALJ concluded that the service area redefinition proposed by RCC was reasonable and should be adopted.

The ALJ also found that there was no basis for requiring RCC to provide universal service in the unserved areas of Koochiching, Lake, St. Louis and Itasca counties, where no incumbent has been assigned as an ETC.

### D. Other Parties' Positions

#### 1. Citizens

Citizens argued that RCC should be designated an ETC in the unserved territories in northern Minnesota within the scope of its FCC license. It argued that RCC is licensed to provide CMRS service throughout several areas of northern Minnesota where no local ILEC has been certified to provide service and there is no reason why this designation should not be made. Such a designation would create a public interest benefit in that any resident seeking service in those areas would obtain service in a simplified and timely manner.

Citizens also argued that RCC's request for ETC designation for only the portion of one of Citizen's exchanges (the Wyoming exchange) that is in RCC's CMRS license coverage shows a disregard for the ILEC exchange boundaries as a dividing line for purposes of universal support and ETC designation.

Further, the sub wire-center disaggregation requested by RCC in the rural telephone company exchanges that it will only partially serve raises several issues that, Citizen's argued, requires further review by the Commission. One such issue would be that this would allow the opportunity for a carrier to choose to serve only the least expensive section of an exchange but receive federal support based on exchange-wide costs.

### 2. RCC

RCC argued that there was no basis or support for Citizens' argument that RCC should be designated as an ETC in unserved area of rural Minnesota. There is no evidence that there has been a request for service in these areas, that no existing common carrier is willing to provide the service, or that RCC would be the best carrier to provide such service. These are the appropriate factors to consider when service is requested in an unserved area and a carrier determines that it does not wish to provide it.

### E. Commission Action

The Commission has the discretion to redefine the service areas of non-rural telephone companies. It finds RCC's request regarding the non-rural telephone companies reasonable and consistent with the Commission's prior decisions and will approve RCC's request as it applies to the non-rural telephone companies.

The Commission agrees with the ALJ that there was no evidence to suggest that RCC is targeting low cost exchanges, or low cost portions of an exchange. If an ETC was targeting low-cost areas within a study area, the ETC could receive the same subsidies per line as the incumbent while incurring a fraction of the cost per line. This would leave the incumbent to serve the higher cost areas. There is no evidence to support that this is the situation here. Rather, RCC is targeting the areas within its licensed service territory, not targeting areas based on costs of service.

The disaggregation of a rural telephone company's service area does not reduce the consideration, including a determination of public interest, that the Commission must give any application by a CLEC for ETC status in a rural telephone company's service area. Any action herein will not affect any future action the Commission may take with respect to the LEC's status as a rural telephone company.

The Commission agrees that the record does not demonstrate support that there would be any additional administrative burden on any rural telephone company if RCC is granted ETC status in the service territory it requested. RCC is proposing to redefine rural LEC service areas solely for ETC designation. This proposal will not impact the way an affected rural LEC calculates its costs; it would be only to determine the LEC area in which RCC is to be designated an ETC.

Finally, the Commission agrees with the ALJ and finds that no legal basis has been shown for Citizens' request that RCC be designated an ETC in unserved territories. There has been no request for service in these areas and no basis for a determination that RCC would be the best carrier to provide such service, if there was such a request.

For all of the above reasons, the Commission finds RCC's request for disaggregation reasonable and will grant it. The Commission will petition the FCC to disaggregate, for ETC purposes, the incumbents' service areas as requested by RCC.

### **ORDER**

- 1. The Commission hereby accepts, adopts and incorporates the ALJ's Findings of Fact, Conclusions of Law and Recommendation, including the following exchanges where RCC seeks disaggregation below the exchange level: Benton Cooperative Telephone Company's Foreston and Ramey exchanges, Citizens Telephone Company's Wyoming exchange, MidState Telephone Company's Murdock exchange, and Sherburne County Rural Telephone Company's Glendorado exchange.
- 2. The Commission grants conditional approval to the Company's application for designation as an eligible telecommunications carrier. Final approval is contingent upon Commission review and approval of the compliance filing set forth in paragraph 3.

- 3. The Company shall make a compliance filing including the following items:
  - (a) information typically gathered from ETCs in the annual certifications,
  - (b) information on rates, terms and conditions applicable to the BUUSO, including customer premise equipment options and charges,
  - (c) an advertising plan,
  - (d) a tariff with terms and rates for the BUUSO, with Lifeline and Link-Up and other services which may be added to a universal service offering,
  - (e) a customer service agreement with customer service and dispute resolution policies, network maintenance policies with procedures for resolving service interruptions and any customer remedies, billing and payment and deposit policies, and
  - (f) a list of the Company's federal obligations regarding its service area.
- 4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar Executive Secretary

(SEAL)

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# BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSISSIPPI

2003-UA-0234

IN RE:

APPLICATION OF CENTENNIAL

CELLULAR TRI-STATE OPER-

ATING PARTNERSHIP and

CENTENNIAL CLAIBORNE CELL-ULAR CORP. FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNI-

CATIONS CARRIER PURSUANT TO SECTION 214(e)(6) OF THE TELECOMMUNICATIONS ACT of

1937

### ORDER

Upon rehearing, there came on for consideration this day the application of Centennial Cellular Tri-State Operating Partnership and Centennial Claiborne Cellular Corporation ("Centennial") for Designation as an Eligible Telecommunications Carrier ("ETC") pursuant to Section 214 (c)(6) of the Telecommunications Act of 1934, as amended ("the Act"). The Commission, being sufficiently advised and with the concurrence of the Public Utilities Staff, finds as follows:

- (1)The Commission has jurisdiction over the subject matter and the parties to enter this Order and entry hereof is in the public interest.
- On April 16, 2003, Centennial filed with this Commission its application for designation (2) as an ETC for purposes of receiving Universal Service Funds ("USF") pursuant to Section 214 (c) of the Act and Federal Communications Commission ("FCC") Rules 47 C.F.R. §§ 54.201 through 54.207 in its FCC-licensed service areas in the State of Mississippi.
- Due and proper notice of the Application was given to all interested persons as required (3)by law and the Commission's Public Utilities Rules of Practice and Procedure.

- (4) BellSouth Telecommunications, Inc., ("BellSouth") and the Mississippi Rural Independent Telephone Companies ("Rural Independents") intervened and became parties of record in this matter.
- (5) Centennial provides wireless telecommunications service in designated areas of the State of Mississippi. These areas are comprised of fourteen counties divided into two areas, Rural Study Area 8 ("RSA8") and Rural Study Area 9 ("RSA9"). These areas are served by rural providers Alltel of Mississippi, Inc., ("Alltel") Franklin Telephone Company, Inc., ("Franklin") and Georgetown Telephone Company, Inc. ("Georgetown").
- (6) Centennial sought and was granted bifurcation of proceedings for consideration separately of the Application in those areas served by BellSouth from those served by the Rural Independents. The ETC designation in BellSouth service areas was granted on September 24, 2003.
- (7) An Order granting ETC status to Centennial in the rural portions of its service area was granted April 7, 2004. An Amended Order for clarification was issued April 22, 2004. The Rural Independents filed a Motion for Rehearing on April 30, 2004. This motion was granted on May 20, 2004.
- (8) A hearing was had on the matter on June 30, 2004, before the full Commission.

# PURPOSES OF THE ACT

(9) The Telecommunications Act of 1934 has as its purpose the goal of making available to all Americans rapid and efficient radio and wire communication service. Rural consumers are a specifically designated concern of the Act, in recognition of the reality that providing service in low population density areas is an expensive proposition to a provider with very little, if any,

<sup>1 47</sup> U.S.C. § 151.

profit margin. Congress explicitly stated rural, insular and high cost areas should have access to reasonably comparable services as those available in more profitable urban areas.<sup>2</sup>

- (10) The 1996 amendments to the Act were intended to fully open the telecommunications market to competition. Specifically, "to provide for a pro-competitive, de-regulatory national policy framework designated to accelerate rapidly the private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . . ."<sup>3</sup> The Universal Service Fund was created as an explicit subsidy to assist in defraying the costs associated with achieving the Act's goals.<sup>4</sup>
- (11) The focus of the Act is on consumers, not companies. Rural telephone companies have not been granted protection from competitive forces, but Congress did recognize the unique position of rural carriers and consumers. In particular, Congress was concerned about the continuation of adequate service to rural consumers in the event a rural incumbent elected to relinquish its ETC designation.<sup>5</sup> To that end, upon consideration of an ETC petition in rural areas, it is not sufficient that a telecommunications carrier is able to provide the necessary services. The Commission must also be persuaded that such a designation serves the public interest.<sup>6</sup>
- (12) The importance of the public interest analysis has drawn much attention lately as part of a larger debate. The exponential growth of the USF in recent years has drawn the future sustainability of the Fund into question. The FCC has received recommendations from the Federal-State Joint Board on Universal Service and intends to make certain changes in the

<sup>&</sup>lt;sup>2</sup> 47 U.S.C. § 254(1)(b).

<sup>&</sup>lt;sup>3</sup> Joint Explanatory Statement of the Committee of the Conference, H.R. Conf. Rcp. No. 458, 104<sup>th</sup> Cong., 2d Sess. At 131.

<sup>4 47</sup> U.S.C. § 254(e).

<sup>&</sup>lt;sup>5</sup> FCC Memorandum Opinion and Order in Re: Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming, CC Docket No. 96-45 (¶ 18)(December 26, 2000). <sup>6</sup> 47 U.S.C. § 214(c)(2).

applicable rules. In the interim, recent decisions of the FCC on ETC designation petitions have encouraged state Commissions to conduct thorough, fact-intensive reviews of ETC petitions for rural areas.<sup>7</sup>

- (13) This Commission has never before defined the factors which constitute the public interest analysis in this context. We take this opportunity to announce the following policy considerations to be applied to applications for ETC designations in rural areas:
  - (1) Benefits of increased competition.
  - (2) Impact of designation upon the Universal Service Fund.
  - (3) Commitment to quality of service by the competitive provider and ability to provide the supported services in a timely manner.
  - (4) Unique advantages and disadvantages of a competitor's service offering.
  - (5) Cream skimming analysis.
- (14) In order to effectuate the above policy considerations, we also announce certain requirements to which a carrier must commit before ETC status in rural areas will be granted. These requirements are discussed in the relevant sections to follow.
- (15) The public interest analysis and requirements we adopt with this Order shall be applicable to all future applications for designation as an eligible telecommunications carrier by any competitive provider.

## 1. Benefits of increased competition

(16) The public benefits of competition are well-known. A competitive marketplace encourages innovation in products and services, produces incentives for efficiencies and increases the service options available to consumers. Competition alone is not sufficient to justify the granting of an ETC designation. It is, however, the articulated purpose of the 1996 amendments to the Act and is thus an important consideration. It is particularly important in the rural setting where the cost of deploying new services is high. Cellular service, while ubiquitous

<sup>&</sup>lt;sup>7</sup> FCC Memorandum Opinion and Order in Re: Virginia Cellular, LLC, Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, CC Docket No. 96-45 (¶ 28)(December 31, 2003).

in urban areas, is less competitive in rural ones and the distance between cellular towers makes service less predictable. Providing funds for cellular services to build and maintain the necessary infrastructure to serve rural areas meets the dual goals of the Act in providing rural Americans with comparable services and encouraging a pro-competitive environment.

Centennial currently provides cellular service in RSAs 8 and 9. With ETC designation, (17)Centennial would be able to expand its coverage area, increase the quality of service available to its customers and make available to rural consumers comparable technology as is available in urban locations. Designation of Contennial as an ETC under this consideration is therefore in the public interest.

## Impact of designation on the Universal Service Fund

- In recent months, a great deal of concern has been expressed regarding the sustainability (18)of the USF due to the tremendous increase in the number of ETC designations granted. 8 A number of suggestions have been made which, if adopted by the FCC, would directly impact future ETC designations by this Commission.
- (19)The importance of sustaining the USF cannot be overstated. At present, however, there is no meaningful measurement of any given designation upon the USF. While one may reach a mathematical calculation which states what percentage of the USF as a whole a company receives, as a practical matter in state proceedings, that number will almost always be insignificantly small. The concern is not how much of the Fund an individual provider would receive but the effect of many companies upon the Fund. While each provider only receives a small amount in comparison to the total Fund, the aggregate directly affects future Fund

Sec, c.g., In re Federal-State Joint Board on Universal Service Recommended Decision, CC Docket No. 96-45

<sup>(</sup>February 27, 2004).

FCC Memorandum Opinion and Order in Re: Virginia Cellular, LLC, Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, ¶ 31.

viability. Thus, a statement that Centennial would receive only a tiny portion of the USF budget is meaningless and, to a degree, misleading as it does not address the actual perils facing the Fund.

- (20) We acknowledge that granting an ETC designation to any company will impact the USF. In this instance, however, that alone is insufficient to deny Centennial's ETC petition. At present, no cellular companies have been granted a rural ETC designation in the State of Mississippi which creates a disadvantage to the rural residents of this state and frustrates the dual purposes of the Act. Designation of Centennial as an ETC under this consideration is therefore in the public interest. As the FCC offers guidance in the future on this matter, we will accordingly amend the manner in which we review this particular concern.
- 3. Commitment to quality of service by the competitive provider and the ability to provide the supported services in a timely fashion
- (21) The concern of the Commission under this consideration is to ensure rural consumers receive high quality, reliable service, particularly in the event a rural incumbent relinquishes its own ETC designation. In addition, the ability to provide quality service furthers the goal of making available to rural consumers technology comparable to that of urban locations.
- (22) Before a provider may be granted ETC status, it must establish it is able to provide certain services:
  - a. Voice grade access to the public switched network;
  - b. Access to free-of-charge "local usage" defined as an amount of minutes of use of exchange service;
  - c. Dual-tone multi-frequency signaling or its functional equivalent;
  - d. Single-party service or its functional equivalent;
  - e. Access to emergency services;
  - f. Access to operator services;
  - g. Access to directory assistance;
  - h. Access to interexchange services;

- i. Toll limitations services for qualifying low-income customers. 10
- (23) In addition to these basic service requirements, the Commission prescribes the following requirements in order to assure quality, quantity and timeliness of service:
  - a. Mandatory compliance with the CTIA Consumer Code for Wireless Service;
  - b. Submission to the Commission the number of consumer complaints per 1000 handsets on a quarterly basis;
  - c. Designation of a representative for addressing customer service or quality of service complaints received by the Commission. The company representative should have the authority to resolve all complaint issues.
  - d. In providing supported services, the competitive provider shall provide immediate service to prospective customers within its existing network. When the prospective customer lies within the carrier's service area but outside of its existing network coverage, the ETC shall take the following steps in descending order:
    - 1. Determine whether the requesting customer's equipment can be modified or replaced to provide service;
    - 2. Determine whether a roof-mounted antenna or other equipment can be deployed to provide service;
    - 3. Determine whether adjustments can be made at the nearest cell tower to provide service;
    - 4. Determine whether a cell-extender or repeater can be employed to provide service;
    - 5. Determine whether there are any other adjustments to network or customer facilities that can be made to provide service;
    - 6. Determine whether it can offer resold services from another carrier's facilities to provide service;
    - 7. Determine whether an additional cell cite can be constructed to provide service and evaluate the costs and benefits of using high-cost support to serve the number of customers requesting service through such additional cell sites. If there is no possibility of providing service short of construction of a new cell site, the ETC will report this fact to the Commission along with the projected costs of construction and the ETC's determination as to whether the request for service is reasonable and whether high-cost funds should be expended on the request.
    - 8. Steps 1-6 of this procedure must be completed by the provider within thirty days of receiving a request for service. Should the provider find it necessary to proceed to Step 7, the provider will promptly notify the Commission and complete the analysis within an additional fifteen days.

<sup>10 47</sup> U.S.C. § 214(e) and C.F.R. § 54.201.

- (24) Financial stability of a company is also an inherent requirement of determining that company's ability to provide service. In addition to the disclosures submitted with an initial filing of an application, a competitive ETC shall file annual reports with the Commission as required under Rule 3(F) of the Commission Rules and Regulations Governing Public Utility Service.
- (25) All of these requirements shall be mandatory for all rural ETCs in the State of Mississippi. Failure to agree to them will result in the denial of an ETC designation petition regardless of any other considerations. Failure to abide by them after designation will result in an immediate inquiry into whether or not a designation should be suspended or withdrawn.
- (26) Centennial has previously established its financial health in the initial review of its petition. A number of the non-financial requirements have already been assumed voluntarily by Centennial, such as compliance with the CTIA Consumer Code of Wireless Service. Centennial has also agreed to abide by some of the reporting obligations of this section. However, Centennial has not agreed to make all of these requirements binding prerequisites to the grant of their application. Such agreement shall be obligatory before the remainder of this Order may be effectuated but otherwise we find designation of Centennial as an ETC under this consideration is in the public interest.
  - 4. Unique advantages or disadvantages of a competitor's service offering
- (27) Wireline and wireless services each have their own advantages and disadvantages. With wireless service the greatest and most obvious advantage is mobility. "The mobility of telecommunications assists customers in rural areas who often must drive significant distances to

places of employment, stores, schools, and other critical community locations." It is also invaluable in summoning emergency services in rural areas where public access telephones are few and far between. Wireless networks also tend to have broader local calling areas than wireline providers which assists in "leveling the field" between rural and urban areas and provides a direct benefit to the individual consumer.

- The disadvantages of wireless include the common requirement by providers that a (28)customer agree to a service contract, often for multiple years. The rural ILECs have no such binding service requirements.
- This Commission also has no authority to regulate the rates of wireless providers. 12 The (29)incumbent carriers' rates are regulated and these companies must seek approval by this Commission before amending them. A wireless provider may alter its rates with no explanation or regulatory oversight. While this is certainly a competitive advantage in the marketplace, it raises for this Commission the concern of predatory pricing behavior. This will be of even greater concern in the future if the FCC adopts the recommendation to limit support to a single, primary line per household.<sup>13</sup> In the far more fiercely competitive atmosphere for Universal Service dollars such a decision would create, predatory pricing is not an insignificant possibility.
- At the present time, the advantages of deploying wireless service on the broadest possible (30)scale outweigh the disadvantages, as well as furthering the goals of the Act. However, in order to assure that the competitive goals of the Act are met but not abused, we shall require wireless ETCs to make all service offerings available on their respective internet web sites, make available to the Commission all documentation to support the retail rates offered in areas in

<sup>&</sup>lt;sup>11</sup> Virginia Cellular Memorandum Opinion and Order (¶ 29). <sup>12</sup> 47 U.S.C. § 332(c)(3).

<sup>&</sup>lt;sup>13</sup> In re Federal-State Joint Board on Universal Service Recommended Decision, CC Docket No. 96-45, ¶ 3.

which the carrier receives federal universal service funds, and to file and update Lifeline/Linkup tariffs for Commission approval.

(31) Centennial must agree to these requirements before the remainder of this Order will be effectuated but otherwise we find designation of Centennial as an ETC under this consideration is in the public interest.

# Cream skimming analysis

- (32) Another concern of designating competitive ETCs is that a competitor shall solicit and serve only in the high density, low cost areas of a rural telephone company's study area. <sup>14</sup> Mississippi is an overwhelmingly rural state. According to the 2000 Federal Census, only three Mississippi cities are classified as non-rural in this context, having populations of 50,000 or more residents. <sup>15</sup> As a practical reality, there are no high density, low cost areas by traditional definition outside of these three population centers, none of which are located within RSAs 8 and 9 and thus there is no cream to skim.
- (33) However, there are areas of higher population concentrations than others even within an officially rural area. We must closely review applications which seek to serve only in those RSAs of *higher* population where a rural telephone company maintains several wire centers in different RSAs. We must also be concerned about competitive wireless providers who only advertise and make available its services in the most heavily populated portions of a rural incumbent's study area despite licensure to serve an entire study area.

<sup>&</sup>lt;sup>14</sup> Virginia Cellular Memorandum Opinion and Order (§ 32).

Biloxi-50,644
 Gulfport-71,127
 Jackson-184,256.

- (34) The FCC has made our analysis infinitely more manageable by their method of issuing cellular service licenses with clearly defined geographical boundaries. These boundaries are static and apply to all providers licensed in a particular market or rural area.
- (35) All competitive ETCs shall be required to advertise and make service available throughout the entirety of their FCC-licensed area. Failure to do so is more often than not an after-the-fact discovery rather than a problem which may be avoided in advance. However, in order to avoid noncompliance as much as is feasible, we shall also require the following reporting obligations of rural competitive ETCs:
  - 1. Submission of quarterly reports detailing the number of service requests in the licensed area which go unfulfilled and the basis for the refusal of service.
  - 2. Submission of an initial build-out plan for areas where facilities do not yet exist upon designation as an eligible carrier.
  - 3. Submission of maps showing existing facilities, coverage area, and planned sites of new facilities upon designation as an eligible carrier and updated annually.
  - 4. Submission of a yearly Universal Service Plan on June 1<sup>st</sup> of each year for the Commission's use in complying with the October 1<sup>st</sup> certification deadline set forth by the FCC. The plan shall include the amount of universal service funds the company expects to receive the following year and the company's proposed use of those funds.
  - 5. The company shall file quarterly reports of the amount of universal funds received for the quarter and updates of the progress of the projects previously approved by the Commission.
- (36) Once again, Centennial has previously agreed to assume some of these reporting obligations but not all. Agreement with all requirements is necessary before the remainder of this Order will become effective.
- (37) Upon consideration of all available facts and policy considerations, we find designation of Centennial as an ETC in Mississippi RSAs 8 and 9 consistent with the public interest.
- (38) The study area of Georgetown Telephone Company is wholly encompassed within RSA
- 9. Alltel of Mississippi, Inc., a disaggregated carrier, serves areas both within and without RSA

9, including a wire center located in Florence, Mississippi. Although the bulk of Alltel's Florence wire center is located outside of RSA 9, a small portion does cross into that study area. Consistent with FCC precedent, Centennial Cellular is not granted ETC designation for the Florence wire center, only for Alltel's Bassfield and Prentiss wire centers, both of which are located entirely within RSA 9. Franklin Telephone Company serves areas in both RSA 8 and 9, as well as areas in southeast Mississippi and northeast Mississippi, areas outside the scope of Centennial's FCC licensed area. Centennial is not logally authorized to render service in the portions of Franklin's study area located outside of RSAs 8 and 9. For this reason, the study area of Franklin Telephone Company, Inc., is subject to redefinition with FCC approval pursuant to 47 C.F.R. § 54.207.

# IT IS, THEREFORE, ORDERED:

- (1) The Application of Centennial Cellular Tri-State Operating Partnership and Centennial Claiborne Cellular Corporation for designation as an eligible telecommunications carrier in the State of Mississippi in Rural Study Areas 8 and 9 for which it holds valid licensure issued by the Federal Communications Commission is GRANTED. Centennial shall provide service either through its own facilities or through its own facilities in combination with resale to all subscribers upon request in its designated area.
- (2) This Order is conditioned upon Centennial's formal, written acceptance of the requirements herein detailed.
- (3) This Order is conditioned upon acceptance by the Federal Communications Commission of a Petition to Redofine the Study Area of Franklin Telephone Company, Inc.
- (4) This designation is for federal universal service funds, and is based on federal rules and guidelines as they presently exist. This Commission retains continuing jurisdiction to review,

modify or revoke its designation. Additionally, should any substantive information in this docket supplied by Centennial prove inaccurate, the designation of Centennial as an ETC is subject to revocation.

(5) The entire file of the Commission and all responses to all discovery requests of the Mississippi Public Utilities Staff are specially made part of the record in this matter. All information or documents submitted to the Commission as proprietary or confidential shall remain under seal.

SO ORDERED, this the  $10^{\rm th}$  day of August, 2004.

Chairman Bo Robinson voted Age, Vice Chairman Nielsen Cochran voted Commissioner Michael Callahan voted Que.



MISSISSIPPI PUBLIC SERVICE COMMISSION

BO ROBINSON, Chairman

NIELSEN COCHRAN, Vice-Chairman

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Supreme Court of Nebraska.

In re APPLICATION No. C-1889 OF GCC LICENSE CORPORATION (Western Wireless).

State of Nebraska, Public Service Commission, Appellee,

v.

Arlington Telephone Company et al., Intervenors-Appellants,

and

Arapahoe Telephone Company et al., Intervenors-Appellees.

No. S-01-343.

June 28, 2002.

Wireless telecommunications carrier applied for designation as eligible telecommunications carrier (ETC), and rural telephone companies contested designation. The state Public Service Commission (PSC) designated carrier as ETC. Rural companies appealed. The Supreme Court, Connolly, J., held that: (1) PSC was not required to engage in rulemaking to define term "public interest"; (2) exclusive ETC status was not a protected interest entitling rural companies to procedural due proces; (3) PSC properly defined "public interest"; (4) PSC's determination that carrier would offer required services was supported by evidence; and (5) companies' argument that PSC violated stay was moot.

Affirmed

West Headnotes

# 11 Public Utilities 194 317Ak194 Most Cited Cases

Appropriate standard of review for appeals from Public Service Commission is review for errors appearing on the record.

# [2] Administrative Law and Procedure 741 15Ak741 Most Cited Cases

When reviewing order for errors appearing on the record, inquiry is whether decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

[3] Statutes 176 361k176 Most Cited Cases

Statutory interpretation presents a question of law.

[4] Appeal and Error \$842(1) 30k842(1) Most Cited Cases

When reviewing questions of law, appellate court has obligation to resolve questions independently of conclusion reached by trial court.

15] Statutes 188 361k188 Most Cited Cases

[5] Statutes 190 361k190 Most Cited Cases

In absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; appellate court will not resort to interpretation to ascertain meaning of statutory words which are plain, direct, and unambiguous.

[6] Telecommunications 7 372k7 Most Cited Cases

State Public Service Commission (PSC) was not required to engage in rulemaking to define term "public interest" as used in federal statute concerning eligible telecommunications carriers (ETC). Communications Act of 1934, § 214(e), as amended, 47 U.S.C.A. § 214(e); Neb.Rev.St. § § 75-110, 84-901, 86-1406.

[7] Constitutional Law 254.1 92k254.1 Most Cited Cases

[7] Constitutional Law 277(1) 92k277(1) Most Cited Cases

[7] Constitutional Law 278(1.1) 92k278(1.1) Most Cited Cases

First step in due process analysis is to identify property or liberty interest entitled to due process protections; if significant property interest is shown, due process requires notice and opportunity to be heard that is appropriate to nature of case. <u>U.S.C.A.</u> Const.Amend. 14.

[8] Constitutional Law 297 92k297 Most Cited Cases 647 N.W.2d 45 (Cite as: 264 Neb. 167, 647 N.W.2d 45)

# [8] Telecommunications 6-461.5 372k461.5 Most Cited Cases

Exclusive eligible telecommunications carriers (ETC) status was not a protected interest entitling incumbent rural carriers to procedural due process under federal law, and thus rural carriers were not entitled to notice from state Public Service Commission (PSC) before PSC designated ETC status upon wireless carrier. U.S.C.A. Const.Amend. 14.

# [9] Telecommunications 6-461.5 372k461.5 Most Cited Cases

State Public Service Commission (PSC) properly defined "public interest," as used in federal statute concerning eligible telecommunications carriers (ETC), when deciding wireless telecommunications carrier's application for designation as an ETC, since PSC considered both whether service area was large enough to prevent harm to consumers by cherry picking and whether rural areas in question could support more than one ETC. Communications Act of 1934, § 214, as amended, 47 U.S.C.A. § 214.

# [10] Administrative Law and Procedure 751 15Ak751 Most Cited Cases

Courts must give substantial deference to regulatory agency's judgment about how best to serve public interest.

# [11] Statutes 199 361k199 Most Cited Cases

Words "public interest" in a federal regulatory statute take meaning from purposes of regulatory legislation.

# [12] Telecommunications 461.5 372k461.5 Most Cited Cases

Determination of state Public Service Commission (PSC) that wireless telecommunications carrier, which had applied for designation as eligible telecommunications carrier (ETC), would offer services required under federal law was supported by carrier's evidence that it was willing and able to provide all services required under federal law, although rural telephone companies opposing carrier's application presented evidence to the contrary. Communications Act of 1934, § § 214(e), 254(c), as amended, 47 U.S.C.A. § § 214(e), 254(c).

# [13] Public Utilities 190

## 317Ak190 Most Cited Cases

Determinations by state Public Service Commission (PSC) are matters peculiarly within its expertise and involve breadth of judgment and policy determination that should not be disturbed by appellate court in absence of showing that action of commission was arbitrary or unreasonable.

# [14] Telecommunications 461.5 372k461.5 Most Cited Cases

Argument by rural telephone companies that state Public Service Commission (PSC) violated statutory stay provisions applicable on appeal from PSC decision designating wireless telecommunications carrier as eligible telecommunications carrier (ETC) was moot, since Supreme Court both denied companies' motion for emergency relief and affirmed PSC's decision. Neb.Rev.St. § 75.134(3).

# [15] Action 6 13k6 Most Cited Cases

Case becomes "moot" when issues initially presented in litigation cease to exist, when litigants lack legally cognizable interest in outcome of litigation, or when litigants seek to determine question which does not rest upon existing facts or rights, in which issues presented are no longer alive.

\*\*46 Syllabus by the Court

- \*167 1. Public Service Commission: Appeal and Error. The appropriate standard of review for appeals from the Nebraska Public Service Commission is a review for errors appearing on the record.
- \*\*47 2. Judgments: Appeal and Error. When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
- 3. Statutes: Judgments: Appeal and Error. Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
- 4. Statutes: Appeal and Error. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the

meaning of statutory words which are plain, direct, and unambiguous.

- 5. Public Service Commission: Words and Phrases. Neb.Rev.Stat. § § 75-110 (Reissue 1996), 86-1406 (Reissue 1999), and 84-901 (Reissue 1999) do not require the Nebraska Public Service Commission to engage in rulemaking to define the term "public interest" in a federal statute.
- 6. Due Process: Property. The first step in a due process analysis is to identify a property or liberty interest entitled to due process protections.
- 7. Due Process: Notice. If a significant property interest is shown, due process requires notice and an opportunity to be heard that is appropriate to the nature of the case.
- 8. Telecommunications: Due Process. Exclusive eligible telecommunications carrier status is not a protected interest entitling incumbent rural telephone carriers to procedural due process under federal law.
- 9. Administrative Law: Public Policy. Courts must give substantial deference to a regulatory agency's judgment about how best to serve the public interest.
- 10. Statutes: Public Policy: Words and Phrases. The words "public interest" in a federal regulatory statute take meaning from the purposes of the regulatory legislation.
- 11. Public Service Commission: Appeal and Error. The appellate courts review a decision of the Public Service Commission for errors appearing on the record.
- 12. Public Service Commission: Appeal and Error. Determinations by the Public Service Commission are matters peculiarly within its expertise and involve a breadth of judgment and policy determination that should not be disturbed by an appellate court in the absence of a showing that the action of the commission was arbitrary or unreasonable.
- 13. Moot Question: Words and Phrases. A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally \*168 cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.

- Kelly R. Dahl and John W. McMullen, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, L.L.P., Omaha, for appellants.
- Steven G. Seglin, of Crosby Guenzel, L.L.P., Lincoln, and Mark J. Ayotte, and Philip R. Schenkenberg, of Briggs and Morgan, P.A., St. Paul, MN, for appellant GCC License Corporation (Western Wireless).
- \*\*48 <u>Don Stenberg</u>, Attorney General, and <u>L. Jay</u> <u>Bartel</u>, Lincoln, for appellee Nebraska Public Service Commission.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

### CONNOLLY, J.

GCC License Corporation is a wholly owned subsidiary of Western Wireless Corporation, doing business in Nebraska as Cellular One (Western Wireless). It was designated by the Nebraska Public Service Commission (PSC) as an eligible telecommunications carrier (ETC) under 47 U.S.C. § 214(e)(2) (Supp. V 1999), part of the federal Telecommunications Act of 1996. Designation as an ETC makes a company eligible for state and federal funding to ensure that all consumers have access to affordable telephone service, a concept that is generally referred to as "universal service." e.g., Alenco Communications, Inc. v. F.C.C., 201 F.3d 608 (5th Cir.2000). The appellants are rural Nebraska telephone companies who intervened in the PSC action to contest the designation of Western Wireless as an ETC.

The appellants contend that to receive ETC designation, Western Wireless had to prove that the designation would be in the public interest under 47 U.S.C. § 214(e). They argue that the PSC was required to engage in rulemaking to define the term "public interest." They also argue that even if rulemaking is not required, the PSC adopted the wrong test to define the public \*169 interest and that the designation of Western Wireless as an ETC was not supported by the evidence. They further argue that the PSC, by certifying Western Wireless' ETC status to the Federal Communications Commission (FCC) after an appeal was filed, violated a stay provision in Neb. Rev Stat. § <u>75-</u> 134(3)

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(Cum.Supp.2000).

We determine that rulemaking was not required and that Western Wireless met its burden of proof that it was eligible for ETC designation. We affirm.

#### BACKGROUND APPLICATION PROCEEDINGS

In August 1998, Western Wireless applied for designation as an ETC in multiple service areas, and the appellants intervened. A hearing was held on the application in October 1999. All parties provided evidence regarding the definition of public interest and whether designation of Western Wireless as an ETC was in the public interest.

Gene DeJordy, an attorney and Western Wireless' representative on a rural task force established by the "Federal State Universal Service Joint Board," testified for Western Wireless as follows: He stated that the federal Telecommunications Act of 1996 and the Nebraska Telecommunications Universal Service Fund Act established a mechanism to achieve a competitive universal service market by bringing the benefits of competition to rural areas. The acts allow incumbent local exchange carriers, as well as competitive carriers, to enter universal service market areas by seeking ETC status. He testified that Western Wireless was capable of offering universal service to rural customers if it was given ETC status. Western Wireless met all of the criteria for ETC designation, including the ability to offer required supported services, such as access to required emergency services.

Western Wireless planned to implement a universal service offering through the use of wireless local loop technology. Using this system, customers would use a \*\*49 wireless system for their home telephone that would be compatible for use with computers and fax DeJordy explained that wireless loop machines. technology has a more powerful output than a handheld wireless telephone and that the quality of service with a wireless \*170 loop system was equal to, or better than, a landline system. He conceded that terrain could cause a signal to be unavailable to a handheld cellular telephone in certain areas, but indicated that the stronger signal of the wireless loop system would generally prevent that problem. also stated that a signal could be optimized at a location by using antennas. Additional cellular sites would be constructed to make service available to all areas if necessary. He conceded that the wireless loop service would not likely be installed in hospitals because the antenna would have to be placed outside instead of inside where it could affect medical devices.

DeJordy further testified that Western Wireless would offer the services at a fixed monthly rate similar to what was offered by the incumbent telephone companies. Western Wireless would also provide an expanded local calling area. According to DeJordy, some customers would likely keep their service with the incumbent local carrier, but would use Western Wireless' services as a second telephone line instead of seeking two lines with the incumbent carrier.

DeJordy testified that designation of Western Wireless as an ETC was in the public interest by providing rural customers with a choice between service providers. Western Wireless would provide a new and innovative service with some extra features such as 24-hour customer service, some mobility of the telephone, and expanded local calling areas. Western Wireless did not provide an economic study regarding the impact a second ETC would have on incumbent rural telephone carriers.

Cynthia Bittinger, the secretary-treasurer for a local exchange carrier, testified on behalf of the appellants. She testified as follows: Western Wireless had not provided enough information to show that it would support the services necessary for ETC designation and had not disclosed the prices and terms under which it would offer services. Designation of Western Wireless as an ETC was not in the public interest because it would jeopardize the ability of incumbent rural carriers to provide basic and advanced services to their customers due to lost She suggested that costs to consumers would rise because of the possibility that a universal service surcharge paid by customers would need to be increased to \*171 support multiple ETC's in rural areas. Bittinger expressed doubt that the economy of rural areas could support two ETC's, especially if the fund had to be adjusted for consumers who carried lines with both carriers. She knew of customers who had experienced dead spots in her area where they were unable to receive a signal when using conventional mobile cellular services provided by Western Wireless.

Steven Watkins, a consultant and attorney, testified for the appellants as follows: Western Wireless had failed to provide sufficient detail regarding the terms and conditions under which it would offer or provide universal service in a manner that would satisfy the conditions necessary for ETC designation. Designation of Western Wireless was not in the

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public interest because if the funds available were diluted due to multiple ETC's, all the carriers might be prevented from upgrading services in high cost areas and rural customers might be subjected to higher rates. He believed that Western Wireless did not have the capacity to serve all the customers \*\*50 in an area as a carrier of last resort. On cross-examination, he stated his disagreement with existing federal rules and admitted that he believed it would never be in the public interest to designate an additional ETC in a rural telephone company area.

Donald Macke, an economist and the executive director of the Nebraska Rural Development Commission, reviewed Western Wireless' application for ETC designation and wrote a detailed report of his findings. Based on standards used to determine whether to assist development projects, Macke testified that it was not in the public interest to designate Western Wireless as an ETC because the ability of rural markets to support a single provider was in question and they could not support multiple providers.

Barbara Wilcox, the director of product and market issues for U S West Communications, Inc., testified that Western Wireless' services might not be affordable to all customers. She testified that Western Wireless should be required to file a business plan and present details regarding the costs of their services before ETC designation could be granted. She admitted that U S West Communications did not file a business plan when it was designated as an ETC.

#### \*172 PSC FINDINGS

In November 2000, the PSC granted Western Wireless' application for ETC designation. order, the PSC stated that it must be shown by clear and convincing evidence that designation of a second ETC in a rural area is in the public interest. PSC found that the purpose of the public interest requirement of 47 U.S.C. § 214(e) was not to protect rural telecommunications companies competition but to ensure that rural areas receive the same benefits as urban areas. The PSC determined that the public interest requirement is centered on a threshold issue of whether a proposed application has defined its service area reasonably enough to prevent " 'cherry picking' " of desirable customers by incoming ETC's. The PSC determined that the designated service area was large enough to prevent cherry-picking. The PSC then determined that Western Wireless also offered additional benefits to the public interest such as an expanded calling area

and mobility.

The PSC found the report written by Macke to be unpersuasive. The PSC found that the report suggested that it should consider the ability of Western Wireless to provide high quality voice, video, and data services as part of the public interest test and suggested that comparisons of capability should he made with existing rural telecommunications providers. The PSC found that there was no basis in law for these suggestions. The PSC also made note of an admission in the report that Macke lacked the expertise to evaluate the capabilities of wireless technology.

The PSC determined that Western Wireless had provided sufficient and credible evidence that it was willing and capable to provide the services required by federal law. The PSC determined that federal law did not require that the services should already be offered and was more concerned with whether the carrier was willing to provide them. Because the PSC determined that Western Wireless was willing to offer the required services and that designation of Western Wireless as an ETC was in the public interest, it granted the application.

The appellants moved for reconsideration. In their motion, the appellants stated that in a posthearing brief, they (1) "suggested that adopting standards to define the 'public interest' might require a rulemaking prior to proceeding with the \*\*51 Application"; \*173 (2) alleged that the PSC had inappropriately adopted a new public interest standard; (3) alleged that rulemaking was required; (4) alleged that they were denied due process; and (5) alleged that the PSC applied the wrong criteria to determine the definition of public interest. After a hearing, the motion for reconsideration was denied.

The appellants filed a notice of appeal on March 19, 2001. On March 29, the PSC certified to the FCC that Western Wireless had been designated as an ETC. The PSC informed the FCC that a notice of appeal had been filed and that the appellants were contending that the notice of appeal held the order granting ETC status in abeyance under Nebraska law. The PSC informed the FCC that oral arguments would be held regarding the effect of the notice of appeal and that the PSC would inform the FCC of any additional findings on the subject. The PSC informed the FCC that if the designation as an ETC was not modified or held in abeyance by the Nebraska courts, that Western Wireless would be eligible to receive federal universal service funding.

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On April 12, 2001, the appellants filed a motion for emergency relief and to compel compliance with § 75-134(3), arguing that under § 75-134, the order of the PSC was held in abeyance while the appeal was pending. The appellants requested that this court order the PSC and Western Wireless to honor the stay imposed by § 75-134. Western Wireless responded that the PSC stated in its order that the order constituted a certificate of ETC designation and that § 75-134 does not hold in abeyance an order authorizing the issuance of a certificate. This court overruled the motion.

#### ASSIGNMENTS OF ERROR

The appellants assign, consolidated and rephrased, that the PSC erred by (1) adopting a public interest test without complying with rulemaking provisions of the Administrative Procedure Act, (2) depriving them of due process by conducting a hearing before determining public interest criteria, (3) applying the wrong standards to define the term public interest, (4) determining that Western Wireless had met its burden of proof for ETC designation, (5) altering their service areas, and (6) implementing its order after an appeal was filed.

#### \*174 STANDARD OF REVIEW

[1] The appropriate standard of review for appeals from the Nebraska Public Service Commission is a review for errors appearing on the record. <u>Nebraska Pub. Serv. Comm. v. Nebraska Pub. Power Dist.</u>, 256 Neb. 479, 590 N.W.2d 840 (1999).

[2] When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* 

[3][4] Statutory interpretation presents a question of law. <u>Manker v. Manker, 263 Neb. 944, 644 N.W.2d 522 (2002)</u>. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. <u>Smeal v. Olson, 263 Neb. 900, 644 N.W.2d 550 (2002)</u>.

#### ANALYSIS RULEMAKING

The appellants contend that the PSC was required to engage in rulemaking under the Administrative Procedure Act to determine the definition of "public interest" found in 47 U.S.C. § 214(e), which

provides:

#### \*\*52 Provision of universal service

#### (1) Eligible telecommunications carriers

A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received--

- (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title ... and
- (B) advertise the availability of such services and the charges therefor using media of general distribution.

# (2) Designation of eligible telecommunications carriers

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications \*175 carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public

<u>Section 214(6)</u> provides authority for the FCC to designate an ETC using identical criteria when an area does not fall under the jurisdiction of a state commission.

Neb.Rev.Stat. § 75-110 (Reissue 1996), pertaining to the PSC, provides:

The Public Service Commission shall adopt and promulgate rules and regulations for the government of its proceedings, including rules of procedure for notice and hearing. The commission shall adopt and promulgate rules and regulations which the commission deems necessary to regulate persons within the commission's jurisdiction. The commission shall not take any action affecting persons subject to the commission's jurisdiction unless such action is taken pursuant to a rule, regulation, or statute.

The Nebraska Telecommunications Universal Service Fund Act provides: "The commission shall 647 N.W.2d 45 (Cite as: 264 Neb. 167, 647 N.W.2d 45)

determine the standards and procedures reasonably necessary, adopt and promulgate rules and regulations as reasonably required, and enter into such contracts with other agencies or private organizations or entities as may be reasonably necessary to efficiently develop, implement, and operate the fund."

Neb.Rev.Stat. § 86-1406 (Reissue 1999).

[5] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002); *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

[6] \*176 Here, the PSC was required to determine the meaning of the term "public interest" as used in 47 U.S.C. § 214(6). Section 75-110 requires the PSC to promulgate rules only for the government of its proceedings, including rules of procedure for notice and hearing and rules which the commission considers necessary \*\*53 to regulate persons within its jurisdiction. We read nothing in § 75-110 that requires the PSC to engage in rulemaking when defining terms in a federal statute unless the PSC first considers that such action is necessary. Indeed, § 75-110 allows the PSC to take any action pursuant to a statute. Likewise, nothing in § 86-1406 requires the PSC to engage in rulemaking to interpret federal law in conjunction with the administration of the Nebraska Telecommunications Universal Service Fund.

The appellants argue, however, that the definition of a "rule" in Neb.Rev.Stat. § 84-901 (Reissue 1999) requires the PSC to engage in rulemaking. They also point to an instance in another context in which the PSC engaged in rulemaking to define the "public interest." Section 84-901 defines a rule or regulation in part as:

(2) Rule or regulation shall mean any rule, regulation, or standard issued by an agency, including the amendment or repeal thereof whether with or without prior hearing and designed to implement, interpret, or make specific the law enforced or administered by it or governing its organization or procedure.

Although § 84-901 states that a rule may include a standard designed to interpret law, it provides a definition only of the term "rule" and does not create any affirmative duties for the PSC to engage in rulemaking when interpreting a federal statute. That

the PSC is allowed to engage in rulemaking when it considers it to be necessary and that a rule is allowed to encompass interpretation of law does not impose any affirmative rulemaking requirement. Here, the PSC did not consider it necessary to engage in rulemaking to interpret the meaning of the term "public interest." The PSC was not required to engage in rulemaking to reach that determination. The appellants' assignment of error is without merit.

#### \*177 DUE PROCESS

The appellants next contend that they were denied due process because the PSC announced a rule regarding public interest without first notifying them regarding what that rule was.

[7] The first step in a due process analysis is to identify a property or liberty interest entitled to due process protections. <u>Marshall v. Wimes. 261 Neb. 846, 626 N.W.2d 229 (2001)</u>. If a significant property interest is shown, due process requires notice and an opportunity to be heard that is appropriate to the nature of the case. See <u>Prime Realty Dev. v. City of Omaha</u>, 258 Neb. 72, 602 N.W.2d 13 (1999).

The Washington Court of Appeals recently held that ETC status is not a protected interest that entitles incumbent telephone companies to procedural due process under federal law. WITA v. WUTC, 110 Wash.App. 498, 41 P.3d 1212 (2002). The Washington Court of Appeals noted that the language of 47 U.S.C. § 214 does not protect incumbent telephone carriers from competition. Rather, the customers' interests, instead of the competitors' interests, control an agency's decision under the act. Thus, the court reasoned, an incumbent carrier did not have a constitutionally protected interest in the designation of another carrier as an ETC.

We agree with the reasoning of the Washington Court of Appeals. Section 214(e)(2) gives a state commission discretion to designate more than one ETC in a rural service area. <u>Id.</u> The Telecommunications Act does not mention protecting the private interests of incumbent rural carriers, who are often exclusive ETC's simply by default as the sole service provider operating in a particular area. <u>Id.</u>

[8] Because exclusive ETC status is not a protected interest entitling incumbent \*\*54 rural carriers to procedural due process under federal law, the appellants' due process claim is without merit. We need not reach the second step in the analysis. See

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<u>id.</u>

#### APPLICATION OF PUBLIC INTEREST TEST

[9] The appellants contend that the PSC applied the wrong factors to determine the definition of public interest. The appellants contend that the PSC should have considered the effect of a second \*178 ETC on incumbent telephone carriers and whether the service area could support more than one ETC.

[10][11] It has been stated that "[c]ourts must give substantial deference to a regulatory agency's judgment about how best to serve the public interest." WITA, 110 Wash.App. at 515-516, 41 P.3d at 1221, citing FCC v. WNCN Listeners Guild, 450 U.S. 582, 101 S.Ct. 1266, 67 L.Ed.2d 521 (1981). The U.S. Supreme Court has consistently stated that the words "public interest" in a federal regulatory statute take meaning from the purposes of the regulatory legislation. NAACP v. FPC, 425 U.S. 662, 96 S.Ct. 1806, 48 L.Ed.2d 284 (1976).

The policy of Congress in creating a public interest requirement was to favor competition. See, e.g., Alenco Communications, Inc. v. F.C.C., 201 F.3d 608 (5th Cir.2000); WITA, supra. Indeed, as one court has noted, the preamble to the Telecommunications Act states that it is " '[a]n act to promote competition and reduce regulation in order to secure lower prices higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.' " In re GCC License Corp., 623 N.W.2d 474, 480 (S.D.2001), quoting Pub. Law 104-104, 110 Stat. 56 (1996).

When considering whether it was in the public interest to designate Western Wireless as an ETC in Wyoming, the FCC, acting in the absence of a state commission, noted that an important goal of 47 U.S.C. § 214 is to open local telecommunications markets to competition. In the Matter of Federal-State Joint Board on Universal Service, 16 F.C.C.R. 48 (2000). The FCC stated that competition benefits consumers in rural and high cost areas by increasing customer choice, innovative services, and new technologies. The FCC rejected the argument that rural areas are not capable of sustaining competition for universal service support. In particular, the FCC stated:

We do not believe that it is self-evident that rural telephone companies cannot survive competition from wireless providers. Specifically, we find no merit to the contention that designation of an additional ETC in areas served by rural telephone companies will necessarily create incentives to reduce investment in infrastructure, raise \*179 rates, or reduce service quality to consumers in rural areas. To the contrary, we believe that competition may provide incentives to the incumbent to implement new operating efficiencies, lower prices, and offer better service to its customers.

<u>16 F.C.C.R.</u> at 57. The FCC, however, did not rule out considering evidence that a particular area could not sustain two ETC's.

The FCC also allowed additional factors to be taken into consideration such as whether consumers would be harmed, whether they would be adequately served should the incumbent telephone company relinquish its ETC designation, and additional benefits to Id. The FCC designated Western consumers. Wireless as an ETC in Wyoming, noting that it had demonstrated a commitment and ability to provide \*\*55 services that minimized the risk that it might not satisfy its obligations as an ETC after designation. In reaching this determination, the FCC considered that Western Wireless already provided services in 17 states and that it was not convinced that incumbent carriers would relinquish their ETC status or withdraw service if Western Wireless was designated as an ETC. The FCC further noted that as an ETC, Western Wireless would have a statutory duty to offer service to every customer within the service area. The FCC also noted additional benefits to consumers through designating Western Wireless as an ETC, such as providing a larger local calling area. Id.

Here, the PSC defined "public interest" in a manner that is consistent with the Telecommunications Act and considered the purpose of the act of furthering competition. The PSC also considered whether the service area was large enough to prevent harm to consumers by " 'cherry picking' " and whether Western Wireless would make additional benefits available to consumers such as mobility and an expanded local calling area. Thus, the PSC applied a definition of "public interest" that mirrors the definition applied by the FCC. In its order, and particularly in its order denying the motion for reconsideration, the PSC made clear that it considered and rejected the argument of the appellants that the rural areas in question could not support more than one ETC. Accordingly, we find no error in the PSC's definition of "public interest."

#### \*180 BURDEN OF PROOF

[12] The appellants argue that Western Wireless

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failed to meet its burden of proof because it showed that it was willing to provide only required services and did not present specific evidence to show that it could do so if it became a carrier of last resort.

[13] This court reviews a decision of the PSC for errors appearing on the record. <u>Nebraska Pub. Serv. Comm. v. Nebraska Pub. Power Dist.</u>, 256 Neb. 479. 590 N.W.2d 840 (1999). Determinations by the PSC are matters peculiarly within its expertise and involve a breadth of judgment and policy determination that should not be disturbed by an appellate court in the absence of a showing that the action of the commission was arbitrary or unreasonable. See <u>In re Application of Jantzen</u>, 245 Neb. 81, 511 N.W.2d 504 (1994).

Section 214(e) requires a carrier seeking ETC status to demonstrate that it will "offer" services required under 47 U.S.C. 254(c) (Supp. V 1999). It has been held in another case involving Western Wireless that 47 U.S.C. § 214(e) requires applicants for ETC designation to show only that they are capable of offering or providing the required services. See Inre GCC License Corp., 623 N.W.2d 474 (S.D.2001). The South Dakota Supreme Court stated that under 47 U.S.C. § 214(e), a carrier designated as an ETC is eligible to receive universal service support, but ETC status does not make federal funding automatic. Thus, if a carrier wishes to receive subsidies, it must follow through on its intentions. Id.

Here, Western Wireless presented evidence that it was willing and able to provide all the services required by federal law. Although the appellants presented evidence to the contrary, the PSC was convinced that Western Wireless could offer the required services and that its ETC designation would be in the public interest. We determine that there was no error in the PSC's determination of this issue. Accordingly, we determine that this assignment of error is without merit.

# ALTERATION OF SERVICE AREAS

The appellants contend that the PSC unlawfully altered their service areas. \*\*56 The PSC was not asked to order, and did not order, a change in the appellants' service areas. Instead, the PSC \*181 designated Western Wireless as an ETC in each of the appellants' study areas. We have reviewed this assignment of error and find it to be without merit.

# AUTOMATIC STAY

[14] The appellants contend that the PSC violated

the stay provision in § 75-134(3). They argue that under § 75-134, the order of the PSC was held in abeyance while the appeal was pending.

[15] A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. <u>Eastroads v. Omaha Zoning Bd. of Appeals</u>, 261 Neb. 969, 628 N.W.2d 677 (2001).

This court has previously denied a motion for emergency relief filed by the appellants regarding this issue, and we now affirm the decision of the PSC. We determine that the issue is moot, and we do not address it.

#### CONCLUSION

We determine that the PSC was not required to engage in rulemaking to define the words "public interest" in 47 U.S.C. § 214(e). We also determine that the appellants were not denied due process when the PSC adopted and applied a definition of "public interest." We determine that the PSC did not err in the manner in which it defined "public interest" and in determining that Western Wireless met its burden of proof to show that it should be designated as an ETC. Finally, we determine that the PSC did not alter the appellants' service areas and that any issue regarding a stay is moot. Accordingly, we affirm.

AFFIRMED.

647 N.W.2d 45, 264 Neb. 167

END OF DOCUMENT

#### BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF SMITH BAGLEY, INC.	)	
FOR DESIGNATION AS AN ELIGIBLE	)	Utility Case No. 3026
TELECOMMUNICATIONS CARRIER	)	
UNDER 47 U.S.C. 214(e)(2)	)	
	)	

#### FINAL ORDER

THIS MATTER comes before the New Mexico Public Regulation Commission ("Commission" or "NMPRC") upon the Recommended Decision of the Hearing Examiner and Certification of Stipulation, issued by William J. Herrmann on August 14, 2001. Having considered the Recommended Decision, the Stipulation, the record in this case, the Briefs, Exceptions, and other pleadings submitted, and being fully informed in the premises,

#### THE COMMISSION FINDS AND CONCLUDES:

- The Commission accepts and adopts the Hearing Examiner's Statement of the Case through the time of the issuance of the Recommended Decision.
- The Commission accepts and adopts the Discussion and the Findings and Conclusions contained in the Recommended Decision as the Discussion and the Findings and Conclusions of the Commission.
- 3. Timely exceptions to the Recommended Decision were filed by the New Mexico Exchange Carriers Group. The Applicant in this case, Smith Bagley, Inc. ("Applicant") timely filed a Reply to Exceptions.

Utility Case No. 3026 FINAL ORDER

- The Commission has jurisdiction over the parties and the subject matter of this case. The Recommended Decision is well taken and should be adopted.
- 5. We take note of, and express our agreement with, the Hearing Examiner's recommended Finding and Conclusion, as set forth in the Recommended Decision at Page 21, Paragraph 7, regarding amendment of the Stipulation to retain the provisions relating to service area and omit the mobility restrictions.
- 6. We understand the concerns raised in the Exceptions filed by NMECG; however, we are not persuaded that NMECG's proposed resolution of those concerns would be in the public interest. We believe that the Hearing Examiner's recommendations are well considered in all respects, and that they should be adopted as modified herein.

#### IT IS THEREFORE ORDERED:

- A. The Orders recommended by the Hearing Examiner, as set forth in Exhibit 1 attached hereto, with the modifications set forth below, in Paragraphs B and C, are ADOPTED, APPROVED, and ACCEPTED as Orders of the Commission.
- B. The Commission's finding of eligibility is expressly conditioned upon the Commission's continuing jurisdiction over the parties and the subject matter of this case. In particular, this order is conditioned upon the Commission's continuing jurisdiction to regulate wireless

telecommunications carriers and the services they provide to New Mexico consumers.

- C. The Commission expressly reserves the right to maintain oversight over the services to be provide by the Applicant in connection with universal service funding, and to require periodic reports to ensure that the Applicant is using such funding for its intended purpose and that the Applicant is otherwise in compliance with applicable Commission rules and regulations. The Hearing Examiner's recommended orders, as set forth in the Recommended Decision at Page 22, Paragraph E, are modified to reflect a due date of September 20, 2002 instead of April 1, 2001 [sic] for the first annual compliance report.
- D. In the event of any material change in the applicable law governing this matter (including but not limited to actions of the New Mexico Legislature, the United States Congress, or the Federal Communications Commission), the Commission shall remain free to revisit its designation of Applicant as an Eligible Telecommunications Carrier.
- E. This Order is effective immediately.
- F. This docket is closed.
- G. Copies of this Order shall be sent to all persons on the attached Certificate of Service.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 19<sup>th</sup> day of February, 2002.

# NEW MEXICO PUBLIC REGULATION COMMISSION

EXCUSED

TONY SCHAEFER, CHAIRMAN

LYNDA M. LOVEJOY, VICE CHAIRWOMAN

HERB H. HUGHES, COMMISSIONER

RORY. MCMINN, COMMISSIONER

JEROME D. BLOCK, COMMISSIONER

AN ME

#### BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF SMITH BAGLEY, INC.	)	
FOR DESIGNATION AS AN ELIGIBLE	)	Utility Case No. 3026
TELECOMMUNICATIONS CARRIER UNDER	)	
47 U.S.C. 214(e)(2)	)	
	)	

# RECOMMENDED DECISION OF THE HEARING EXAMINER AND CERTIFICATION OF STIPULATION

William J. Herrmann, Hearing Examiner in this case, hereby submits this Recommended Decision and Certification of Stipulation to the New Mexico Public Regulation Commission ("Commission" or "NMPRC") pursuant to NMPRC Utility Division Rules. The Stipulation is attached hereto as Exhibit A. The Hearing Examiner recommends that the Commission adopt the following Statement of the Case and Discussion.

### STATEMENT OF THE CASE

On April 27, 1999, Smith Bagley, Inc. ("SBI") d/b/a Cellular One filed a Petition for Designation as an Eligible Telecommunications Carrier ("ETC") in order to be eligible to obtain federal Universal Service funding in portions of New Mexico. On August 17, 1999, SBI amended its Petition, narrowing the area of requested ETC designation to Native American lands within its service area.

On June 1, 2000, the Commission designated William J. Herrmann as Hearing Examiner in this case. By Order dated June 23, 2000, a pre-hearing conference was scheduled for July 18, 2000. On July 13, 2000, SBI filed the Direct Testimony of Richard Watkins. SBI participated in the pre-hearing conference on July 18, 2000 via conference call.

On July 18, 2000, the Hearing Examiner issued a Notice of Hearing and Procedural

Order in which it was Ordered, (1) that a hearing be held on September 21, 2000, (2) that

any interested person wishing to become a party to the proceeding file a motion to

intervene by August 25, 2000, (3) that Intervenor and Staff testimony be filed by

September 11, 2000. (4) that rebuttal testimony be filed no later than September 18, 2000.

and (5) that a pre-hearing conference be held on September 13, 2000. This Order also

required that SBI mail a copy of the Order to those parties listed on the

telecommunications service list and to the local exchange companies within the requested

areas of ETC designation. SBI was also required to publish the Order in a newspaper of

general circulation in its service area one time prior to July 28, 2000.

On July 24, 2000, SBI mailed a copy of the Notice of Hearing and Procedural Order

to all parties on the telecommunications service list and to the local exchange carriers

within its requested area of designation. On July 26, 2000 the Notice of Hearing and

Procedural Order was published in the Albuquerque Journal, and a copy of the Affidavit of

Publication was filed with the Commission on July 29, 2000.

On August 2, 2000, Qwest Corporation (formerly U.S. West Communications, Inc.)

("Qwest") filed a Motion to Intervene in this case. On August 23, 2000, the New Mexico

Exchange Carriers Group ("NMECG") filed a Motion for Leave to Intervene.

On September 13, 2000, a pre-hearing conference was held and was attended by

SBI, the NMECG, and Commission staff. The parties agreed to continue the hearing until

October 18, 2000. An Order was issued on September 13, 2000, reflecting this new

hearing date.

RECOMMENDED DECISION OF THE HEARING EXAMINER AND CERTIFICATION OF STIPULATION

Utility Case No. 3026

Supplemental Direct Testimony of Richard Watkins was filed on October 16, 2000 on behalf of SBI. The Commission Staff filed Prepared Direct Testimony of Jose R. Martinez, II on September 11, 2000. No other testimony was filed in this proceeding.

The hearing in this case was held before the Hearing Examiner at the Commission's Utility Division offices and commenced on October 18, 2000 and concluded on October 19, 2000.

#### **APPEARANCES**

### For SBI:

Robert M. Hall, Esq.
Payne and Hall, P.C.
6301 Indian School Road, N.E. - Suite 450
Albuquerque, NM 87176-5970

-and-

David A. LaFuria, Esq. Lukas, Nace, Gutierrez and Sachs, Chartered 1111 19th Street, N.W. - Suite 1200 Washington, DC 20036

### For NMECG:

William P. Templeman, Esq. Comeau, Maldegen, Templeman & Indall, L.L.P. Post Office Box 669 Santa Fe, NM 87504-0669

### For the Commission Staff:

Avelino Gutierrez, Esq. Staff Counsel 224 East Palace Avenue Santa Fe, New Mexico 87501

RECOMMENDED DECISION OF THE HEARING EXAMINER AND CERTIFICATION OF STIPULATION Utility Case No. 3026

Other Appearances:

None

No appearance was made on behalf of the other intervenor in this case, Qwest. On

motion of Staff Counsel, the Hearing Examiner terminated Qwest's status as an intervenor

in this proceeding.

The Hearing Examiner admitted into the record written and oral testimony from SBI

witness Richard Watkins and from Staff witness Jose R. Martinez, II. The Hearing

Examiner ordered SBI to submit a proposed Recommended Decision on or before

November 9, 2000, as well as an accurate map depicting SBI's requested area of ETC

designation on or before October 27, 2000. SBI submitted its map October 26, 2000. The

Hearing Examiner ordered that briefs to be filed by the NMECG and the Staff by December

1, 2000, with any reply briefs to be submitted by December 8, 2000. The record was

closed, pending receipt of SBI's map.

After the submissions of briefs in this proceeding and a Status Conference held on

January 18, 2001, the Hearing Examiner, on January 19, 2001, reopened the record to

take supplemental testimony on certain issues. These issues included whether the ETC

service boundary was appropriate and whether a mobility restriction on the use of a

wireless phone was necessary. In addition, the Hearing Examiner found that the record did

not adequately consider certain findings required by the Federal-State Joint Board on

Universal Service ("Joint Board"), Recommended Decision, 17 FCC Rcd 87 (1996).

On February 21, 2001, SBI submitted Supplemental Testimony of Richard Watkins

supporting a decision that imposes no restrictions on mobility. Thereafter, Staff and SBI

RECOMMENDED DECISION OF THE HEARING EXAMINER AND CERTIFICATION OF STIPULATION

drafted a Stipulation that resolved the remaining outstanding issues in the proceeding.

NMECG declined to sign the Stipulation. On May 4, 2001, Staff filed a Motion to Adopt

Stipulation and Set a Procedural Schedule. At a Pre-Hearing Conference held on May 22,

2001, the Hearing Examiner adopted a procedural schedule for the filing of objections and

testimony on the Stipulation, and ordered a hearing on the Stipulation to be held on July

10, 2001. The Hearing Examiner's orders were memorialized in a Third Procedural Order,

issued May 23, 2001.

On June 7, 2001, NMECG filed a Preliminary Statement of Objections to Proposed

Stipulation. On June 19, 2001, SBI filed Supplemental Direct Testimony of Richard

Watkins. On June 22, 2001, Staff filed Prepared Direct Testimony of Gary G. Roybal. On

June 29, 2001, SBI filed its Reply to Preliminary Statement of Objections. On July 10,

2001, Staff and SBI finalized and executed the Stipulation.

On July 10, 2001, a hearing was held on the Stipulation. At the stipulation hearing,

Staff was represented by Avelino Gutierrez, SBI by David LaFuria, and NMECG by William

Templeman. The Hearing Examiner accepted into the record written and oral testimony

from SBI witness Richard Watkins and from Staff witness Gary Roybal. NMECG did not

submit testimony. The Hearing Examiner accepted the Stipulation into the record, as well

as a map of the ETC service area provided by SBI.

DISCUSSION

NMPRC Rule 17 NMAC 13.10.27.1 sets forth the requirements a carrier must satisfy

in order to obtain ETC status. A carrier must (1) include a description of the proposed

service area for which it seeks designation that is consistent with the federal requirements

RECOMMENDED DECISION OF THE HEARING EXAMINER AND CERTIFICATION OF STIPULATION

Utility Case No. 3026

relating to service areas set forth in 47 C.F.R. Section 54.207, and (2) demonstrate that it meets the requirements in Section 214(e) of the Communication Act of 1934, as amended (the "Federal Act"), 47 U.S.C. '214(e). An applicant meets the requirements of Section 214(e) if it: (A) is a common carrier; (B) will offer the supported services in a universal service offering; (C) will advertise the availability of the supported services; and (D) will make the supported services available throughout a designated service area.

#### A. Common Carrier.

Mr. Watkins testified that Section 332(a)(1) of the Federal Act, 47 U.S.C. §332(a)(1), states that a Commercial Mobile Radio Service ("CMRS") provider is treated as a common carrier except as otherwise determined by the FCC, and Section 20.9(a)(7) of the FCC's rules specifically provides that cellular service, such as that provided by SBI, is considered a common carrier service. 47 C.F.R. § 20.9(a)(7). (<u>Id</u>. at pp.7-8).

#### B. Offering of Supported Services.

The FCC has identified the following services and functionalities as the core services to be offered by an ETC and supported by federal universal service support mechanisms:

- 1. voice-grade access to the public switched telephone network;
- local usage;
- 3. dual tone multi-frequency signaling or its functional equivalent;
- 4. single-party service or its functional equivalent;
- access to emergency services;
- 6. access to operator services;
- 7. access to interexchange service;
- 8. access to directory assistance; and
- 9. toll limitation for qualifying low-income consumers.

47 C.F.R. § 54.101(a).

Mr. Watkins stated that SBI meets the requirement that it provide each of these services as explained below.

- 1. Voice-grade access to the public switched telephone network. Mr. Watkins testified that SBI provides voice-grade access to the public switched telephone network within a bandwidth of approximately 2700 Hertz within the 300 to 3000 Hertz frequency range. Federal-State Joint Board on Universal Service 12 FCC Rcd 8776 (1997) ("Universal Service Order"), ¶¶63-64. (Watkins Dir. Test. at p.8).
- 2. <u>Local Usage</u>. Beyond providing access to the public switched network, an ETC must include local usage as part of a universal service offering. To date, the FCC has not quantified a minimum amount of local usage required to be included in a universal service offering. Mr. Watkins testified that SBI will comply with any and all minimum local usage requirements adopted by the FCC and will meet the local usage requirements by including local usage as part of a universal service offering. (<u>Id</u>. at p.9).
- Dual-tone, multi-frequency ("DTMF") signaling, or its functional equivalent. DTMF is a method of signaling that facilitates the transportation of call set-up and call detail information. Consistent with the principles of competitive and technological neutrality, the FCC permits carriers to provide signaling that is functionally equivalent to DTMF in satisfaction of this service requirement. 47 C.F.R.§ 54.101(a)(3). Mr. Watkins testified that, SBI currently uses out-of-band digital signaling and in-band multi-frequency ("MF") signaling that is functionally equivalent to DTMF signaling and, therefore, meets the requirement that it provide DTMF signaling or its functional equivalent. (Watkins Dir. Test. at p.10).

- 4. <u>Single-party service or its functional equivalent</u>. "Single-party service" means that only one party will be served by a subscriber loop or access line in contrast to a multiparty line. *Universal Service Order*, ¶62. The FCC concluded that a wireless provider offers the equivalent of single-party service when it offers a dedicated message path for the length of a user's particular transmission. *Universal Service Order*, ¶62. Mr. Watkins has testified that SBI meets the requirement of single-party service by providing a dedicated message path for the length of all customer calls. (Watkins Dir. Test. at p.10.)
- 5. Access to emergency services. The ability to reach a public emergency service provider by dialing 911 is a required service in any universal service offering. Enhanced 911 or E911, which includes the capability of providing both automatic numbering information ("ANI") and automatic location information ("ALI"), is only required if a public emergency service provider makes arrangements with the local provider for the delivery of such information. See Universal Service Order, ¶¶ 72-73. Mr. Watkins testified that SBI currently provides all of its customers with access to emergency service by dialing 911 in satisfaction of this requirement. (Watkins Dir. Test. at p.11). To date, no public emergency service provider in New Mexico has requested E-911 service from SBI (Id.).
- 6. Access to operator services. Access to operator services is defined as any automatic or live assistance provided to a consumer to arrange for the billing or completion, or both, of a telephone call. *Universal Service Order*, ¶75. Mr. Watkins testified that SBI meets this requirement by providing all of its customers with access to operator services provided by either SBI or other entities (e.g., LECs, IXCs, etc.). (Watkins Dir. Test. at p.11).

- 7. Access to interexchange service. A universal service provider must offer consumers access to interexchange service to make and receive toll or interexchange calls. Mr. Watkins testified that SBI presently meets this requirement by providing all of its customers with the ability to make and receive interexchange or toll calls through direct interconnection arrangements the Company has with several Interexchange Carriers ("IXCs"). Additionally, customers are able to reach their IXC of choice by dialing the appropriate access code (*Id.*).
- 8. Access to directory assistance. The ability to place a call to directory assistance is a required service offering. *Universal Service Order*, ¶¶ 80-81. Mr. Watkins testified that SBI meets this requirement by providing all of its customers with access to directory assistance by dialing "411" or "555-1212". (Watkins Dir. Test. at p.12).
- 9. <u>Toll limitation for qualifying low-income consumers</u>. An ETC must offer "toll blocking" services to qualifying Lifeline customers at no charge. Toll blocking, allows customers to block the completion of outgoing toll calls. *Universal Service Order*, ¶ 82. Mr. Watkins testified that today, SBI provides toll-blocking services for international calls and customer selected toll calls. SBI currently has the technology to provide toll blocking for both incoming and outgoing calls, and will use this technology to provide the service to its Lifeline customers, at no charge, as part of its universal service offering. (Watkins Dir. Test. at pp.12-13).

The Federal Act requires the carrier to offer the supported services upon commencement of its universal service offering. Federal-State Join Board on Universal Service, Western Wireless Corporation (Petition for Preemption of an Order of the South

Dakota Public Utilities Commission, Declaratory Ruling, FCC 00-248, CC Docket No. 96-45 (Aug. 10, 2000), ¶ 2817. SBI has testified that it provides all of the nine required service offerings. Further, this Commission should require SBI to abide by any further regulatory requirements imposed by the state or federal governments as a condition to maintaining its ETC status. Therefore the Commission should find that SBI meets the requirements contained in 47 C.F.R. § 54.101(a).

### C. Advertising of Supported Services.

Mr. Watkins stated that SBI will advertise the availability of the supported services and the corresponding charges in a manner that fully informs the general public within the designated service area of the services and charges and complies with the recently enacted FCC directive. (Watkins Dir. Test. at p.19). According to Mr. Watkins, SBI currently advertises its wireless services through several different media, including newspaper, television, and radio, and SBI will use this same media to advertise its universal service offerings. Mr. Watkins also testified that SBI will also seek innovative ways to reach Native American subscribers, in order to increase telephone penetration on tribal lands. He stated that, for example, company plans to hold town hall meetings (Tr. 49) and use mobile offices to introduce its service to potential new subscribers. (Tr. 51).

### D. Proposed Service Area Definition.

Under Section 214(e)(2) of the Federal Act, and Section 54.207(a) of the FCC's rules, this Commission is empowered to designate a service area boundary for an ETC. PRC Rule 17 NMAC 13.10.27.1 requires a service area that is consistent with the federal requirements contained in Section 54.207 of the FCC's rules. Under 47 C.F.R. Section

54.207(b), for areas served by rural LECs, the service area is equal to the LEC study area. In such areas, the FCC permits a state to define a service area that is not contiguous with a LEC study area boundary, provided such definition takes into account recommendations of the Federal-State Joint Board and is presented to the FCC in a petition. **See**, 47 C.F.R. § 54.207(c).

### 1. SBI's Proposed Service Area

Century Tel of the Southwest, Inc. ("CenturyTel") is the incumbent LEC within SBI's proposed service area. CenturyTel is a rural telephone company. SBI serves a portion of CenturyTel's study area, which includes areas that are non-contiguous.

Mr. Watkins initially testified that SBI's proposed ETC service area is defined as the boundaries of the Ramah Navajo and Pueblo of Zuni reservations. Mr. Watkins also testified that SBI provides service throughout the reservations at issue. The map submitted by SBI depicting its proposed service area shows a small area in the northeast corner of the Zuni reservation where SBI is not licensed by the FCC to provide Commercial Mobile Radio Services ("CMRS"). Accordingly, despite the fact that SBI may provide "real world" coverage in that corner area, SBI is not licensed by the FCC to serve that area at this time. SBI's proposed ETC service area is not contiguous with wire center boundaries and SBI argued that there is no FCC or Commission requirement that ETC service areas be defined along wire center boundaries. Mr. Watkins testified that if SBI is required to serve CenturyTel's entire study area, SBI will be precluded from providing universal services, simply because it does not have an FCC license to provide service throughout CenturyTel's study area. Mr. Watkins testified that disaggregation would be in the public interest since it

would promote competition and facilitate expeditious service to Native American communities. (Watkins Dir. Test. At pp.21-23) As will be explained, SBI and Staff agreed, in their Stipulation, to a different ETC service area.

#### 2. FCC Petition to Approve SBI's Service Area Designation

After this Commission approves a definition of a competitive ETC service area, either the Commission or the ETC applicant may petition the FCC for the redefinition of the LEC service area. The petition must include the proposed service area definition and the state commission's ruling or other official statement including the reasons for adopting the proposed definition. In areas served by rural telephone companies, this Commission and the FCC must agree on a proposed service area for purposes of designating the area where the ETC will receive universal service support. See, 47 C.F.R. Section 54.207(c).

Once a petition is submitted to the FCC, the FCC has 14 days within which to issue a public notice. The FCC may then choose to initiate a proceeding to consider the petition. If the FCC has not acted within 90 days after the public notice, the definition proposed by the state commission will be deemed approved by the Commission and shall take effect in accordance with state procedures.

In order to recommend to the FCC pursuant to Section 54.207(c) that SBI's proposed service area be designated as proposed, this Commission is required to consider the *Joint Board's Recommended Decision*. Specifically, the Commission must consider

<sup>1</sup>See 47 C.F.R. ' 54.207(c)(1).

<sup>&</sup>lt;sup>2</sup>There was discussion at the hearing concerning the "disaggregation" of LEC "study areas". In fact, the Section 54.207(c) proceeding at the FCC does not contemplate disaggregation of LEC study areas, but instead speaks of redefining or disaggregating a rural telephone company's "service area".

whether SBI is attempting to "cream skim" the rural LEC's service area. Mr. Watkins testified that SBI based its requested service area definition solely on its intent to provide service to Native American communities. (Watkins Sup. Test. at 5). Mr. Watkins also testified that SBI has thus far spent approximately \$600,000 to construct facilities which

provide coverage within its proposed ETC service area (Tr. 173).

The second consideration is whether the rural LEC's special status under the Telecommunications Act of 1996 will be duly recognized in this proceeding. Mr. Watkins testified that in considering the public interest factors in granting ETC status, the Commission would be duly recognizing the special status of CenturyTel as a rural telephone company (Watkins Sup. Test. at 6). In addition, Mr. Watkins stated that the LEC's status as it pertains to interconnection, unbundling, and resale requirements would in no way be altered by redefining its service area (*Id.*).

Finally, the Commission must consider whether a redefinition of service area would impose an additional administrative burden for CenturyTel. Redefining CenturyTel's service area in order to permit SBI to serve less than CenturyTel's entire study area will not impose an additional administrative burden on CenturyTel.

The Stipulation and testimony in support of the Stipulation supplements the findings the Commission needs to consider pursuant to the Joint Board. The Stipulation, resolves several issues, as follows:

# A. ETC Service Area Boundary

SBI's original ETC application proposed an ETC service area boundary that is contiguous with the Zuni and Ramah Native American reservations. Staff expressed

concerns that the service area boundary should more closely follow that of CenturyTel, the

incumbent LEC serving the region. SBI is not able to provide facilities-based services to the

entire service area of CenturyTel because it is not licensed by the FCC along LEC service

area boundaries.

Accordingly, it was agreed by Staff and SBI that SBI's ETC service area should be

defined to include additional areas outside of SBI's licensed service area. The Stipulation

defines SBI's service area "to include the Zuni, Ramah, and Fence Lake wire centers. In

addition, SBI's ETC service area shall be defined consistent with that portion of its existing

service contour within the Pine Hill, Vanderwagon, Gallup and Grants wire centers." See,

Stipulation, at p.1. SBI also committed to use commercially reasonable efforts to attempt to

arrange for the provision of wireless communications service in those portions of the

Vanderwagon and Pine Hill wire centers which are outside of SBI's service area through

the A-Side cellular telephone carrier licensed to serve those areas. Id.

The Stipulation recommends that the PRC disaggregate the incumbent LEC service

area of CenturyTel to encompass the Pecos exchange as one service area and the

remaining CenturyTel exchanges as a second service area. See, Stipulation at p.2, ¶3;

Reopened Staff Exhibit 2 at p.5. Disaggregation is intended to cause SBI's ETC service

area to closely follow the CenturyTel service area boundaries.

Mr. Watkins testified that SBI's agreement to expand SBI's proposed ETC service

area is intended to alleviate Staff and NMECG's concerns about cream skimming and

administrative burden. Reopened SBI Exhibit 2, at p.3.

RECOMMENDED DECISION OF THE HEARING EXAMINER AND CERTIFICATION OF STIPULATION Utility Case No. 3026

Mr. Roybal testified that disaggregating the study area into two service areas would "eliminate any cost distortion that may result from averaging line costs across the study area. This will reduce any shortfalls or windfalls to CenturyTel or SBI because federal high cost support will be calculated on the average cost per line with the 'disaggregated' service area." Reopened Staff Exhibit 2 at p.5. Mr. Roybal also testified that based on his evaluation of SBI's coverage and CenturyTel's service area, "Staff concludes that there is no attempt by SBI to target specific wire centers for service that would result in 'cream skimming'". Reopened Staff Exhibit 2 at p.8. Finally, Mr. Roybal testified that SBI's agreement to expand its BUS throughout its service contour in the Western Exchanges will significantly mitigate any administrative burden on CenturyTel because CenturyTel maintains its cost data on a wire center basis." Reopened Staff Exhibit 2 at p.9.

#### B. Mobility

SBI proposed in its application to permit a subscriber taking SBI's Basic Universal Service ("BUS") offering to be able to use its phone throughout SBI's entire network, which encompasses a service area in New Mexico and Arizona. Mr. Watkins testified that SBI intends to afford all of its customers the flexibility to communicate throughout SBI's service area. He also testified that limiting mobility would diminish the advantages that wireless communications provides. *Reopened SBI Exhibit 1* at p.3.

In response to concerns raised by NMECG, Mr. Watkins testified that the mobility problem to be solved is a subscriber who uses a subsidized phone *primarily* outside of its ETC service area, *Reopened SBI Exhibit* 2 at p.4, and that casual calling by a subscriber traveling outside of the reservation boundaries, but on SBI's network does not in any way

diminish the goals of the universal service program. Reopened SBI Exhibit 1 at p.5. Mr. Watkins also testified that there is nothing in either the Communications Act, the FCC's rules, or the New Mexico PRC rules which restrict calls to the ETC service area. Id. Mr. Watkins testified that SBI could monitor customer usage through its billing software and switch and prevent a customer from using a subsidized phone primarily outside of the ETC service area. Reopened SBI Exhibit 1 at p.7. At the June 10 hearing, Mr. Watkins estimated that new switching software to limit customer usage to a single cell site could cost up to \$175,000 now, and even more when SBI moves to a digital platform. July 10 Tr. at 25. Finally, Mr. Watkins testified that it is required by law to obtain verifying information from a customer and that there is no valid reason to impose perspective restrictions on mobility.

The Stipulation sets forth a detailed list of commitments SBI is to undertake if the Stipulation is approved. To summarize, BUS customers must use at least 75% of the minutes included in SBI's BUS plan within SBI's ETC service area. When a BUS customer uses more than 25% of its included minutes outside of SBI's ETC service area in any month, SBI must notify the customer with a voice prompt, a telephone call and a letter. A second violation within the first year will cause three more notifications as provided above, along with a disconnect notice which provides the customer with information concerning its options in the event of a disconnect. A third violation in the first year will cause the customer's service to be suspended for the remainder of the first year of the contract. In addition, SBI will provide the customer with several options to enable the phone to continue to be used for emergency and prepaid calls. SBI may restore Lifeline support at the

RECOMMENDED DECISION OF THE HEARING EXAMINER AND CERTIFICATION OF STIPULATION Utility Case No. 3026

conclusion of the first year, and during the second year of the contract the same procedures will apply. A customer suspended a second time will not be eligible for reinstatement for twelve months. *Stipulation*, at pp 3-4.

#### **CONCLUSIONS**

The public interest will be served by adopting the Stipulation's definition of an ETC service area boundary for SBI. Expanding the ETC service area to encompass the majority of people living within the corresponding CenturyTel service area will bring a competitive BUS offering to a greater number of people than originally proposed by SBI. The PRC is empowered to designate SBI's ETC service area boundary consistent with the public interest and that there is no rule requiring such boundary to match exactly that of the incumbent LEC. Based upon the map submitted in this proceeding, SBI will cover most of the territory and people within the affected LEC service area. Moreover, SBI has committed to use commercially reasonable efforts to provide service to those persons living in the areas designated in SBI's map, who live outside of its authorized FCC service area, through resale of the A-side cellular carrier in those areas.

Disaggregation of the incumbent LEC service area as recommended by the Staff is in the public interest. Designating CenturyTel's Pecos exchange, which is not contiguous with the remaining exchanges as one service area and its remaining exchanges (the "Western Exchanges") as a second service area will result in more accurate targeting of universal service support, by minimizing shortfalls or windfalls resulting from averaging costs across a geographically and economically diverse study area.

RECOMMENDED DECISION OF THE HEARING EXAMINER AND CERTIFICATION OF STIPULATION Utility Case No. 3026

SBI has not attempted to cream skim CenturyTel's service area and its commitment

to cover the great majority of CenturyTel's Western Exchanges satisfies any such concern.

SBI is proposing to bring ETC service to as much of CenturyTel's Western Exchanges as

possible and it is not targeting only the lowest cost exchanges within CenturyTel's service

area.

In addition, CenturyTel will not suffer any adverse administrative burden as a result

of the disaggregation proceeding. Century Tel calculates its costs on a wire center basis,

and the disaggregation proposed herein will only require CenturyTel to average its costs

among the wire centers which encompass its Western Exchanges. NMECG has presented

no evidence to demonstrate any adverse administrative burden as a result of the

disaggregation plan.

Finally, CenturyTel's status as a rural carrier will not be compromised by

disaggregation. Pursuant to the FCC's Fourteenth Report and Order, CenturyTel may

propose to this Commission a different disaggregation plan at a later date, more accurately

targeting high cost funding. In sum, nothing in this proceeding compromises CenturyTel's

status as a rural carrier.

If the Commission agrees that some restriction on mobility is necessary, then the

plan to restrict mobility contained in the Stipulation is reasonable. The problem to be

addressed is primary usage of a subsidized phone outside of the ETC service area. SBI

has demonstrated its ability to curtail such usage through its switch and billing software.

Moreover, an absolute prohibition on usage outside of the ETC service area does not serve

the public interest, as SBI's expanded footprint and local calling areas are important

RECOMMENDED DECISION OF THE HEARING EXAMINER AND CERTIFICATION OF STIPULATION

Utility Case No. 3026

competitive features which should not be precluded. Finally, the plan to provide BUS customers with multiple forms of notice and opportunity to continue to make emergency calls and prepaid calls enables customers who do not comply with the mobility requirement to maintain emergency calling capability which is essential in remote areas.

The Hearing Examiner finds, however, that the plan to limit mobility as detailed in the Stipulation may not serve the public interest. This issue is presently before the Commission in NMPRC Case No. 2921. In that case, a Recommended Decision found that restrictions on mobility were not in the public interest and stated

The Hearing Examiner does not find any evidence in the record that would support the contention that there is a substantial risk of improper distribution of USF funds. The mere possibility that a customer might use Western Wireless' service in an inappropriate r potentially unlawful manner does not outweigh the potential anti-competitive effects that placing limits on the service could have. The Hearing Examiner finds that New Mexico consumers should be able to fully utilize Western Wireless' service and the benefits of competition and emerging technology. Therefore, the Hearing Examiner declines to accept conditions which would limit Western Wireless' universal service offering.

For the reasons stated in that decision and by SBI in this proceeding, the Commission may, as a matter of policy, find that restrictions on mobility should not be imposed. SBI recently received ETC designation in Arizona that does not have any restrictions on mobility. In fact, the Commission is not aware of any other state that has imposed such restrictions. Finally, SBI and Staff agreed at the hearing not to object to the removal of the restrictions on mobility, should the Commission disagree with the Stipulation and find that there should be no restrictions on mobility.

RECOMMENDED DECISION OF THE HEARING EXAMINER AND CERTIFICATION OF STIPULATION Utility Case No. 3026

The record in this proceeding indicates that telephone service penetration on the Zuni and Ramah reservations is among the lowest in the state. A wireless alternative, which expands the options for persons living in these areas, will serve the public interest. This state and the FCC have stated in their strong desire to find innovative ways to increase service penetration levels on Native American lands. SBI's proposed service offering will reach some customers who have never had a phone. In addition, it provides other customers a choice of service providers for the first time. The public interest in expediting SBI's proposed service offering to these areas outweighs any general concern about a perceived need to match SBI's ETC boundary strictly to CenturyTeI's entire service area. There should be no competitive harm which will be caused as a result of SBI's proposed ETC service area definition.

In sum, it is recommended that SBI's proposed ETC service area, as described above, be adopted, and CenturyTel's service area be disaggregated as described herein for the purpose of federal ETC determination.

The Hearing Examiner recommends that the Commission FIND and CONCLUDE that:

- 1. The Statement of the Case, Discussion, and all findings and conclusions contained therein are hereby incorporated by reference as a finding and conclusion.
- The Commission has jurisdiction over the parties and subject matter of this case.

. . . . .

<sup>&</sup>lt;sup>3</sup>See, <u>Mescalero Apache Telecom, Inc.</u>, Utility Case No. 3364 (released August 15, 2000), 2000 WL 1448525 at p.1 and n. 2, *Policy Statement*, FCC 00-207 (released June 23, 2000).

- Due and proper notice of this case has been provided.
- 4. Based on the evidence and circumstances in this case, SBI has (1) included a description of the proposed service area for which it seeks designation that, if approved by the FCC under 47 C.F.R. Section 54.207(c), is consistent with the federal requirements relating to service areas, and (2) adequately demonstrated that it meets the requirements in Section 214(e) of the Federal Act and Section 54.101(a) of the FCC's rules.
- 5. SBI is willing and able to meet all other requirements and standards set forth under applicable New Mexico law pertaining to eligibility for ETC status, and the NMPRC has the authority to require SBI to continue to meet such standards established for ETC's in New Mexico.
- 6. SBI has satisfied the criteria for eligibility for ETC status in the State of New Mexico, and shall be designated as an ETC in New Mexico for the service area as set forth herein, pending confirmation by the FCC in a proceeding under Section 54.207(c) of the FCC's rules, which will be initiated following issuance of this Commission's Order.
- 7. The Stipulation attached hereto as Exhibit A should be adopted as amended herein in that the provisions regarding restrictions on mobility are not accepted.

The Hearing Examiner recommends that the Commission ORDER:

A. A Grant of Eligible Telecommunications Carrier status, enabling SBI to receive federal and state universal service funding shall be and hereby is issued to SBI. This Order shall constitute such Grant.

- B. SBI's Eligible Telecommunications Carrier status is conditional upon confirmation of its service area designation by the FCC, to be obtained following the close of this proceeding.
  - C. The Stipulation is adopted as amended herein.
- D. SBI's obligation to use commercially reasonable efforts to provide service to those areas outside of its FCC-licensed service area designated in SBI Reopened Exhibit 3 (the "Extension Areas") through an agreement with the A-band cellular carrier shall commence upon Final Order of the Commission in this case.
- E. Beginning on April 1, 2001, SBI shall be required to submit to the Staff an annual compliance report containing, (i) the number of potential subscribers in the Extension Areas who have requested SBI's BUS offering; (ii) the number of subscribers that SBI is serving with its BUS offering in the Extension Areas; and if the Stipulated restrictions on mobility are retained, (iii) the number of subscribers that SBI has notified of noncompliance with the mobility restriction contained in the Stipulation; and (iv) and the number of subscribers who have had service suspended as a result of noncompliance. The first annual report shall also describe SBI's efforts to provide service in the Extension Areas. The annual reporting requirement is subject to and shall be modified by any subsequent changes adopted in the course of a rulemaking proceeding.
- F. CenturyTel's service area shall be disaggregated into two parts, for the purpose of calculating universal service support. The Pecos exchange shall be one service area. The second service area shall be comprised of the following exchanges: Pine Hill, Vanderwagon, Zuni, Ramah and Fence Lake.

- G. The Stipulation is part of the Final Order of the Commission in this proceeding, however, the Stipulation only binds the signatories thereto and does not bind any other party who did not enter into the Stipulation.
  - H. This Docket is closed.
  - 1. This Order is effective immediately.
- J. Copies of this Order shall be mailed to all persons on the attached Certificate of Service.

ISSUED at Santa Fe, New Mexico this 14th day of August, 2001.

**NEW MEXICO PUBLIC REGULATION COMMISSION** 

WILLIAM J. HERRMANN HEARING EXAMINER

#### "EXHIBIT A"

### BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

APPLICATION OF SMITH BAGLEY, INC.	)	
FOR DESIGNATION AS AN ELIGIBLE	)	
TELECOMMUNICATIONS CARRIER	)	Utility Case No. 3026
UNDER 47 U.S.C. § 214(e)(2)	)	•

#### STIPULATION

Smith Bagley, Inc. ("SBI") by its counsel, and the Staff of the New Mexico Public Regulation Commission ("Staff") hereby enter into the following Stipulation in order to resolve certain outstanding issues in the above-captioned proceeding. The parties submit this Stipulation for approval by the Public Regulation Commission ("PRC") pursuant to 1.2.23 of the Commission's Rules, 17 NMAC 1.2.23. In support of this Stipulation, the following is respectfully shown:

- I. ETC Service Area Boundary.
- In its above-captioned application, SBI proposed that its Eligible Telecommunications
   Carrier ("ETC") service area be defined as the boundaries of the Zuni and Ramah reservations.

   Following discussion among the parties, SBI has agreed to modify its ETC service area boundary, and make commercially reasonable efforts to serve complete wire centers as follows:
  - A. SBI's ETC service area shall be defined to include the Zuni, Ramah, and Fence Lake wire centers. In addition, SBI's ETC service area shall be defined consistent with that portion of its existing service contour within the Pine Hill, Vanderwagn, Gallup and Grants wire centers. A map depicting SBI's ETC service area is attached hereto as Exhibit A.
  - B. For potential subscribers residing in the Northern portion of the Vanderwagn wire center and Southeast portion of the Pine Hill wire center, outside SBI's operating service area, SBI agrees to use commercially reasonable efforts to attempt to arrange for the

provision of wireless communications service through the A-Side cellular telephone carrier licensed to service that area.

- 2. The parties agree that amending SBI's ETC service area and encouraging SBI to attempt to provide service throughout the Vanderwagn and Pine Hill wire center will alleviate concerns about cream skimming and administrative burden. Specifically, the designation of ETC status throughout the Zuni, Ramah, and Fence Lake wire centers, and in approximately 89% of the remaining wire centers¹ will ensure that SBI's Basic Universal Service ("BUS") offering will be made available throughout the widest possible area. This alleviates the concern that SBI's service is targeted to only lower cost portions of affected wire centers.
- 3. The parties recommend that the PRC disaggregate the incumbent LEC service area along wire center boundaries. Since SBI's service will closely follow wire center boundaries, there is no concern that the incumbent LEC would accrue any additional administrative burden with respect to calculating appropriate high cost loop support.

#### II. Mobility

4. In its application, SBI proposed to permit a subscriber taking SBI's basic universal service ("BUS") offering to be able to use its phone throughout SBI's entire network. The parties discussed two concerns. First, the possibility that universal service subscribers who reside outside of the ETC service area will fraudulently take SBI's BUS offering, which is limited to residents within the ETC service area. Second, the possibility that BUS subscribers will use their phones excessively outside the authorized ETC service area. In order to alleviate these concerns,

SBI estimates that its ETC service area will encompass 89.1% of the geographic area and 96.9% of the population of the Pine Hill wire center as well as 88.5% of the geographic area and 90.9% of the population of the Vanderwagn wire center.

SBI agrees to the following conditions and further agrees to implement certain measures as set forth below:

- A. BUS customers must use at least 75% of the minutes included in SBI's BUS plan within SBI's ETC service area.
- B. When a BUS customer uses more than 25% of its included minutes outside of SBI's ETC service area in any month, SBI will promptly notify the customer as follows:
  - i. A voice prompt generated by SBI's prepaid system will inform the customer before completing a call in the following month;
  - ii. A telephone call from an SBI customer service representative explaining that the customer has exceeded the plan limits; and
  - iii. SBI will mail an explanatory letter to the customer.

This first notification shall explain the program requirements and inform the customer that failure to comply three times within twelve months will result in discontinuance of universal service subsidies.

- C. When a BUS customer uses more than 25% of its included minutes outside of SBI's ETC service area a second time within the first year of the contract, SBI will promptly notify the customer in the same manner as provided above. This second notification shall serve as a disconnect notice to the subscriber. The notice shall state clearly that if the subscriber fails to comply a third time within twelve months that Lifeline subsidies will be discontinued. The notice shall also state that in the event Lifeline subsidies are discontinued, the customer may, (i) disconnect service, (ii) pay full price for the service and move to a post-paid payment plan (if creditworthy), or (iii) continue as a prepaid subscriber, receive zero included minutes in future months, use the phone for emergency (911) calls, and retain the ability to purchase prepaid minutes for use.
- D. When a BUS customer uses more than 25% of its included minutes outside of SBI's ETC service area a third time within the first year of the contract, SBI will promptly notify the customer in the same manner as provided above. This third notification shall state that Lifeline service has been suspended for the remainder of the first year of the contract. SBI shall provide the customer with one of the three options set forth above. If the subscriber fails to choose an option, SBI shall keep the subscribers phone active, but remove the 200 included minutes during the suspension period. This will permit the subscriber to use the phone for

- emergencies and to purchase prepaid minutes. If the subscriber moves to a retail rate plan, SBI shall credit any prepaid access charges against the first month's service charges. If the subscriber discontinues service or continues service with zero included minutes, SBI shall refund any prepaid access charges.
- E. SBI shall not include the loops of suspended BUS customers in its periodic loop count reports to USAC.
- F. If a BUS customer's service is suspended, SBI may restore Lifeline support at the conclusion of the first year of the contract. During the second year of the contract, the same procedures set forth above shall apply. If a BUS customer is suspended a second time, it shall not be eligible for reinstatement to the Lifeline program for twelve months.

#### III. General Terms

- 5. This Stipulation represents a settlement and compromise of claims and accordingly this Stipulation is made for settlement purposes only. No party concedes the validity or correctness of any regulatory principle or methodology directly or indirectly incorporated in this Stipulation. No precedential effect or other significance, except as may be necessary to enforce this Stipulation or a PRC order concerning this Stipulation, shall be attached to any principle or methodology contained in this Stipulation.
- 6. All witnesses of the parties will support all aspects of the Stipulation embodied in this document in any hearing conducted to determine whether the PRC should approve this Stipulation. Each party also agrees that, except as expressly provided in this Stipulation, it will take no action in any administrative or judicial proceeding, which would have the effect, directly or indirectly, of contravening the provisions of this Stipulation. Without prejudice to the foregoing, the parties expressly reserve the right to advocate positions different from those stated in this Agreement in any proceeding other than one necessary to obtain approval of, or enforce this Stipulation or a PRC order approving this Stipulation. Nothing in this Stipulation shall

constitute a waiver by any party with respect to any matter not specifically addressed in this Stipulation.

- 7. This Stipulation shall not become effective until the PRC issues a final order approving the Stipulation, which order does not contain any modification of the terms and conditions of this Stipulation that is unacceptable to any of the parties to the Stipulation. In the event the PRC modifies this Stipulation in a manner unacceptable to any party hereto, that party may withdraw from the Stipulation and shall so notify the PRC and the other parties to the Stipulation in writing within ten (10) days of the date of the PRC order. In the event a party exercises its right to withdraw from the Stipulation, this Stipulation shall be null and void and of no effect in this or any other proceedings.
- 8. In the event this Agreement becomes null and void or in the event the PRC does not approve this Stipulation, this Stipulation, as well as the negotiation undertaken in conjunction with the Stipulation, shall not be admissible into evidence in these or any other proceedings.
- 9. Should the FCC adopt any service requirements which conflict with this Stipulation, the FCC's rules shall control. SBI reserves the right to apply to the PRC to amend these terms if they prove to be administratively burdensome or fail to accomplish their intended purposes.
- 10. The parties state that they have reached this Stipulation by means of a negotiated process that is in the public interest, and that the results reflected in this Stipulation are just, reasonable and in the public interest. Approval by the PRC of this Stipulation shall constitute a determination that the Stipulation represents a just, equitable, and reasonable resolution of the issues addressed herein.
- 11. This Stipulation is an integrated agreement that may not be altered by the unilateral determination of any party.

12. This Stipulation may be executed in separate counterparts, including facsimile. The counterparts taken together shall constitute the Stipulation. The parties represent that the signatories to the Stipulation have full authority to bind their respective parties to the terms of the Stipulation.

WHEREFORE, the parties respectfully submit this Stipulation for approval by the PRC and request that the PRC grant such approval.

SMITH BAGLEY, INC.

Ву:
Richard Watkins
Its Authorized Representative
STAFF OF THE NEW MEXICO
PUBLIC REGULATION COMMISSION
D.*

### BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

APPLICATION OF SMITH BAGLEY, INC.	)
FOR DESIGNATION AS AN ELIGIBLE	)
TELECOMMUNICATIONS CARRIER	) Utility Case No. 3026
UNDER 47 U.S.C. § 214(e)(2)	)
011DE1(4) 0.0.0. § 214(0)(2)	_)′

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Recommended Decision of the Hearing Examiner and Certification of Stipulation, issued August 14, 2001, was mailed First Class, postage prepaid, to the following persons:

David A. LaFuria, Esq.
Samule F. Cullari, Esq.
Lukas, Nace, Gutierrez & Sachs,
Chartered
1111 Nineteenth Street, N.W.
Suite 1200
Washington, D.C. 20036

William P. Templeman, Esq. Comeau, Maldegen, Templeman & Indall, LLP Post Office Box 669 Santa Fe, NM 87504-0669

### and hand-delivered to:

Avelino Gutierrez, Esq. Legal Division Director NM Public Regulation Commission Post Office Box 1269 Santa Fe, NM 87501

DATED this 14th day of August, 2001.

**NEW MEXICO PUBLIC REGULATION COMMISSION** 

ELIZABETH SAIZ, Law Clerk

This is an electronic copy. Format and font may vary from the official version. Attachments may not appear.

BEFORE THE PUBLIC UTILITY COMMISSION

### **OF OREGON**

UM 1083

In the Matter of	)	
RCC MINNESOTA, INC.	)	
	)	ORDER
Application for Designation as an Eligible	)	
Telecommunications Carrier, Pursuant to	)	
the Telecommunications Act of 1996.	)	

# DISPOSITION: APPLICATION FOR CERTIFICATION GRANTED; STUDY AREA REDEFINED

On May 12, 2003, RCC Minnesota Inc. (RCC) filed this application for designation as an eligible telecommunications carrier (ETC) authorized to receive money from the federal Universal Service Fund. Staff participated in the docket and ultimately recommended granting the application, with the requirement that RCC file specific reports on its collection and expenditure of federal universal service funds in its annual recertification process. The Oregon Telecommunications Association (OTA) and others intervened and actively opposed the application for designation in the rural areas because it felt that the application was not in the public interest. We find that the application is in the public interest, and grant the application with the conditions suggested by Staff.

#### PROCEDURAL BACKGROUND

On May 12, 2003, RCC filed its application. Verizon Northwest, Inc. (Verizon), OTA, Midvale Telephone Exchange (Midvale), and Malheur Home Telephone Company (Malheur Home) filed petitions to intervene, which were granted on September 4, 2003. A standard protective order went into effect on the same date. See Order No. 03-538. Verizon did not actively participate in the docket and filed one brief, which is addressed in this order. Midvale and Malheur Home submitted testimony and participated in the hearing but did not submit legal briefs.

The parties stipulated to Commission jurisdiction over the matter and filed opening testimony on October 23, 2003. A second round of testimony was filed on December 1, 2003. A three-day hearing was held from December 15 through 17, 2003. The parties filed briefs in February and March.

The Federal Communications Commission (FCC) released its decision in Highland Cellular on April 12, 2004, which prompted the parties to recommend further briefing and analysis. In the Matter of Federal-State Joint Board on Universal Service; Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, FCC 04-37, 19 FCC Rcd 6422 (released April 12, 2004). Subsequent briefs were filed by Staff on April 28, 2004; OTA on May 5, 2004; and RCC on May 10, 2004. All parties filed their last round of briefs on May 28, 2004, including RCC's amendment to its application, and RCC filed a revised map on June 4, 2004.

The Commission held oral arguments on June 10, 2004. RCC moved that the transcript from the oral argument in *In the Matter of United States Cellular Corporation, Application for Designation as an Eligible Telecommunications Carrier Pursuant to the Telecommunications Act of 1996*, UM 1084, be admitted into the record of this proceeding. That motion was granted.

#### VERIZON'S MOTION

At the outset, we acknowledge Verizon's brief in this docket. Verizon participated in neither testimony nor the hearing, and it filed one brief. In its brief, Verizon suggested that the Commission defer any action on the ETC applications until the FCC has acted on recommendations of the Federal-State Joint Board on Universal Service. The recommendations of the Joint Board were issued on February 27, 2004. See In the Matter of Federal-State Joint Boardn Universal Service, FCC 04J-1, 19 FCC Rcd 4257 (released Feb 27, 2004). RCC argued that ETC designations should not be delayed while the FCC goes through what could be a long process in making a final determination on the recommendations of the Joint Board. In addition, we note that the FCC itself, standing in the shoes of another state commission has proceeded with ETC designations. See Highland Cellular (released April 28, 2004). For these reasons, we decline Verizon's suggestion to defer action on an ETC application until the FCC has taken final action on the recommendations of the Federal-State Joint Board.

#### APPLICABLE LAW

The federal Telecommunications Act of 1996 (Act) sets out the parameters for designation of ETCs but grants wide latitude to the state public utility commission to develop its own standard of public interest. To evaluate this application, we first examine the framework under federal law, and then we address each requirement in turn.

#### Federal Framework

Section 254 of the Act governs the Universal Service Fund (USF). The statute states that universal service policies should promote quality services at just, reasonable, and affordable rates; access to advanced telecommunications and information services; access to services in rural areas comparable to services in urban areas; and other policies as are developed over time. 47 USC § 254(b). The statute also states, "Universal service is an evolving level of telecommunications services." 47 USC § 254(c)(1). Telecommunications carriers that have been designated ETCs under section 214(e) "shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." 47 USC § 254(e).

An ETC only receives USF support for customers that it serves in areas where USF support is distributed. 47 CFR § 54.307(a). The ETC can offer services, either using its own facilities or through a combination of its own facilities and resale of another carrier's services. 47 USC § 214(e)(1). An ETC does not receive support if it serves a customer through resale of another carrier's facilities, but only if it serves the customer using its own facilities. 47 CFR § 54.307(a)(3). The amount of support provided to the ETC for a customer line mirrors the amount provided to the incumbent local exchange carrier (ILEC) for that customer line. 47 CFR § 54.307(a)(4).

The basic test for whether an applicant should be designated as an ETC is (1) whether it offers the services supported by federal universal service support mechanisms, and (2) whether it advertises those services. 47 USC § 214(e)(1). The Act then requires two different standards for granting ETC designation depending on what type of ILEC serves the area in which ETC status is sought. Where a non-rural ILEC serves the area, the state commission shall designate more than one ETC "[u]pon request and consistent with the public interest, convenience, and necessity." 47 USC § 214(e)(2). Where a rural ILEC serves the area, the state commission may choose to designate more than one ETC only after a specific finding "that the designation is in the public interest." *Id.* 

The map at Appendix A indicates the entire service area for which RCC is seeking ETC designation. The chart at Appendix B indicates which wire centers it seeks to serve, according to ILEC. RCC proposes to serve at least part of the service areas served by the following ILECs: Qwest Corporation (Qwest), Verizon, CenturyTel of Oregon, Inc., and CenturyTel of Eastern Oregon, Inc. (collectively "CenturyTel"), Eagle Telephone System, Inc. (Eagle), Helix Telephone Co. (Helix Tel), Midvale, Malheur Home, Oregon Telephone Corp. (Oregon Tel), Pine Telephone System, Inc. (Pine Tel), and Sprint/United Telephone Co. of the Northwest (Sprint).

To evaluate RCC's application, we will address each requirement — provision of the services supported by the universal service fund, advertisement of those services, and, in areas served by local exchange carriers, the finding of public interest — in turn.

### I. USF Supported Services

The services supported by federal universal service support mechanisms are listed in federal regulations:

- 1. voice grade access to the public switched network;
- 2. local usage;
- 3. dual tone multi-frequency signaling, or its functional equivalent;
- 4. single-party service, or its functional equivalent;
- 5. access to emergency services;
- 6. access to operator services;
  - 7. access to interexchange service;
  - 8. access to directory assistance; and
  - 9. toll limitation for qualifying low-income customers.

47 CFR § 54.101(a). The rule provides further definitions of each service. RCC asserted in its application, and no party has disputed, its ability to provide the nine supported services. See Application of RCC Minnesota, Inc., for Designation as an Eligible Telecommunications Carrier, RCC/1 at ¶¶ 12-20 (Application).

The only matter of contention regards the quantity of local usage minutes provided by RCC's rate plans. The rule defines local usage as "an amount of minutes of use of exchange service, prescribed by the Commission, provided free of charge to end users." 47 CFR § 54.101(a)(2). The FCC has declined to require a certain number of minimum minutes, and we are not aware of state commissions that have elected to impose a minimum number of minutes. In re Federal-State Joint Board on Universal Service, Virginia Cellular, LLC, Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, FCC 03-338, 19 FCC Rcd 1563, ¶ 22 (released Jan 22, 2004) (Virginia Cellular); Smith Bagley, Dec No 66566, ¶ 38 (AZ Corp Commn, Nov 18, 2003) (Smith Bagley III). OTA argues that this Commission should require that RCC offer an unlimited number of local minutes, if not as part of the local usage requirement, then under the public interest finding. \frac{1}{2}

<sup>&</sup>lt;sup>1</sup> OTA asserts that the Minnesota Commission has imposed this requirement. A reading of the Minnesota Commission's order reveals that the ETC applicants offered plans with unlimited usage, and the Minnesota Commission endorsed those plans. In the Matter of Minnesota Cellular Corporation's Petition for Designation as an Eligible Telecommunications Carrier, Docket No. P-5695/M-98-1285 at 22 (Oct 27, 1999) ("The Commission accepts Minnesota Cellular at its word — and intends to hold it to its word — that it will offer at least one universal service package with unlimited local usage priced within 10% of the incumbents' standard rates.") RCC makes no such offer in this case, so we evaluate the local usage requirement according to the law.

RCC has submitted its current local usage plans. The plans begin with \$10 per month for a package including no local minutes; \$20 per month for a plan including 100 "anytime minutes;" \$40 per month for a plan with 500 "anytime minutes;" or \$50 per month for a plan with 1000 "anytime minutes." Each plan offers additional minutes to be paid for on a per minute basis. RCC plans comport with the federal local usage requirement. Moreover, as the Arizona Commission noted, if none of the plans suit the needs of the customers, RCC will not be able to acquire customers or the USF support funds that go with those customers. *Smith Bagley III* at ¶ 37.

In addition, RCC has committed to complying with any local usage requirements as may be established by the FCC in the future. *See* Application, RCC/1 at ¶ 13. This commitment has satisfied other jurisdictions, *Highland Cellular* at ¶ 15; *Virginia Cellular* at ¶ 14; and we also find it satisfactory.

As to provision of access to emergency services, RCC's testimony stated that it provides standard 911 service throughout its service area, better known as E911 Phase 0. RCC has also deployed E911 Phase I, which adds a callback number and identifies the cell site or call sector, in all of its service area except Lake and Harney counties. In its testimony, RCC committed to adding E911 Phase 2 as it upgrades its facilities throughout its network in Oregon. See Testimony of Kyle Gruis, RCC/19, Gruis/3 at 1. 8-22. OTA stated that it believes that RCC is making sufficient progress in upgrading its network and does not argue that additional requirements should be added to this part of the application.

#### II. Advertisement of Services

RCC committed to advertise the availability of each of the supported services throughout its licensed service area. Possible methods of advertisement include newspaper, magazine, direct mailings, public exhibit and displays, bill inserts, and telephone directory advertising. In addition, RCC stated it would advertise the availability of Lifeline and Linkup assistance through the methods of advertising above, as well as reaching out to community health, welfare, and employment offices to provide information to those people most likely to qualify for Lifeline and Linkup benefits. OTA recommends that this Commission require RCC to file an advertisement plan. We find that RCC's commitment to advertise the supported services meets the statutory requirement under federal law for certification and will require an advertising plan to be submitted at the annual recertification process.

### III. Type of Incumbent ILEC

#### A. Areas served by non-rural ILECs

As discussed above, the Commission shall designate a second ETC where it offers and advertises the nine supported services listed in 47 CFR § 54.101(a) in an area served by a non-rural ILEC, if it is "consistent with the public interest, convenience, and necessity." 47 USC § 214(e)(2). The FCC has stated, "[F]or those areas served by non-rural telephone companies, the designation of an additional ETC based upon a demonstration that the requesting carrier complies with the statutory eligibility obligations of section 214(e)(1) is consistent *per se* with the public interest." *In the Matter of Pine Belt Cellular, Inc. and Pine Belt PCS, Inc., Petition for Designation as an Eligible Telecommunications Carrier*, DA 02-1252, 17 FCC Rcd 9589 ¶ 13 (released May 24, 2002) (*Pine Belt Order*).

The Act defines a "rural telephone company" as a

local exchange carrier operating entity to the extent that such entity—

- (A) provides common carrier service to any local exchange carrier study area that does not include either--
- (i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or
- (ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;
- (B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;
- (C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or
- (D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

47 USC § 153(37). Qwest and Verizon are considered non-rural ILECs under the Act. See In the Matter of the Investigation Into Expansion of the Oregon Universal Service Fund to Include the Service Areas of Rural Telecommunications Carriers, UM 1017, Order No. 03-595, 3 (Oct 2, 2003) (referring to Qwest and Verizon as Oregon's two non-rural LECs). Despite being defined as non-rural ILECs, Qwest and Verizon serve many rural areas in Oregon. Neither Qwest nor Verizon opposed this application.

RCC has shown that it provides the nine supported services and has pledged to advertise them throughout the area. Because compliance with those requirements is "consistent *per se* with the public interest," *Pine Belt Order* at ¶ 13, RCC's application as to the wire centers served by Qwest and Verizon should be granted.

### B. Areas served by rural ILECs

For areas served by rural ILECs, federal law requires that the Commission must also find that "the designation is in the public interest." 47 USC § 214(e)(2). Federal law neither defines "public interest" nor provides additional guidance, except through FCC decisions on individual ETC designations. We may also impose additional requirements, either now, or in subsequent annual recertification proceedings. See Tex. Off. of Pub. Util. Counsel v. FCC, 183 F3d 393, 418 (5<sup>th</sup> Cir 1999), cert granted sub nom, GTE Serv. Corp. v. FCC, 530 US 1213 (2000), cert dismissed, 531 US 975 (2001) (TOPUC v. FCC).

The parties in this proceeding propose numerous criteria for consideration in making a public interest finding. Before addressing the party's respective proposals, however, we begin by noting the purpose of the federal Universal Service Fund. Federal statute states that universal service policies should promote:

- 1) quality service at just, reasonable, and affordable rates;
- 2) access to advanced telecommunications and information services;
- access to services in rural areas comparable to services in urban areas;
   and
- 4) other policies as are developed over time.

47 USC § 254(b). We consider these policies in gauging whether RCC's application is in the public interest. As to the first factor, RCC has incentives to provide high quality service at reasonable rates, in order to win customers and receive USF support to serve those customers. As to the third factor, wireless service is ubiquitous in urban areas, and providing wireless service in the ETC designation area brings service in rural areas closer to service provided in urban areas.

As to the second factor, access to advanced services, we particularly appreciate RCC's commitment to upgrade its facilities to provide a GSM system that will allow RCC customers to purchase high-speed digital packet data services such as Internet access. RCC/19, Gruis/15 at l. 3-13. We understand that Internet access is not a supported service. But because the designation area is quite rural and still developing access to the Internet, we count this commitment by RCC as one reason why granting its application is in the public interest. Accordingly, we ask RCC to report on its progress

<sup>&</sup>lt;sup>2</sup> The FCC has not weighed in on many aspects of ETC designation, except for where it has stood in the shoes of another state commission. Those FCC decisions are not binding on this Commission, as has been strenuously argued by RCC, but the decisions are instructive to our analysis.

and plans for the future in providing such service in its designated area during the annual recertification process.

The parties suggest additional factors to be considered in the public interest analysis, some of which overlap. We will address each factor in turn.

Do competitive ETC designations lead to increased competitive choice? RCC recommends that we consider this factor, drawn from Virginia Cellular at ¶ 28. RCC contends that designating an additional ETC provides an obvious increase in competitive choice. OTA rejects competition as a benefit and states that the positive elements associated with competition will not necessarily be present if this application is granted.

Other jurisdictions facing this question have found competitive benefits in designating a wireless ETC in a rural area:

We do not believe that it is self-evident that rural telephone companies cannot survive competition from wireless providers. Specifically, we find no merit to the contention that designation of an additional ETC in areas served by rural telephone companies will necessarily create incentives to reduce investment in infrastructure, raise rates, or reduce service quality to consumers in rural areas. To the contrary, we believe that competition may provide incentives to the incumbent to implement new operating efficiencies, lower prices, and offer better service to its customers.

In the Matter of Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier In the State of Wyoming, DA 00-2896, 16 FCC Rcd 48, 57, ¶ 22 (released Dec 26, 2000) (Wyoming Order). We are not convinced that rural ILEC investments in infrastructure will diminish if a competitive ETC (CETC) is designated. There is only speculation that if a CETC is designated, and if customers drop their wireline service, then the rural ILEC will lose USF support. That reasoning is too hypothetical to be persuasive at this point, especially given the difference between RCC's wireless offerings and the rural ILECs' wireline offerings. This issue may be raised later, however, if substantial evidence shows that there is an impact.

What are the unique advantages and disadvantages of the competitor's service offering? RCC offers wireless services, which has more applications than wireline service offered by rural ILECs. As the FCC stated, wireless service also offers a distinct benefit in rural areas:

[T]he mobility of telecommunications assists consumers in rural areas who often must drive significant distances to places of employment, stores, schools, and other critical community locations. In addition, the availability of a wireless universal service offering provides access to emergency services that can mitigate the unique risks of geographic isolation associated with living in rural communities.

Highland Cellular at ¶ 23. OTA argues that poor service quality in wireless communications is a strong disadvantage. Staff approaches the issue from the perspective of whether CETCs will provide benefits to rural consumers that are not available from the ILECs. Staff concluded that RCC's commitment to add cell sites and expand capacity and quality of service at existing cell sites would provide real benefits to consumers. In addition, the nature of RCC's local calling area means that calls that would be toll calls over a wireline service are merely local calls over wireless. We agree that the "unique advantages" of wireless telephones, which allow mobile communications beneficial to safety, health, and commerce, weighs in favor of the application.

Have any commitments been made regarding quality of telephone service? Rural ILECs are required to provide a certain basic level of service quality and quantity to customers, and OTA raises the concern that RCC will be eligible for USF support without providing a similar level of service. We are constrained by state statute from regulating the service quality of wireless carriers, which also hamstrings this Commission's ability to resolve disputes without any yardstick to measure quality standards against. However, we share OTA's concern that adequate service is provided to customers. On one level, we agree that if service quality is inadequate, customers will drop the service, and RCC will lose support for those customers, giving RCC an incentive to provide quality service. However, we also believe that the annual reporting requirements should be supplemented with details as to how many complaints were received as to service quality, by wire center, and how they were resolved.

OTA also notes that RCC has not provided any contracts for resale for service in areas in which RCC seeks ETC designation but are outside of its CGSA. RCC stated in its briefs that at its annual recertification, it would supply an affidavit as to the existence of those contracts, and if pressed, provide for *in camera* review of those contracts. However, RCC asserts that those contracts should be protected from disclosure because of their commercial sensitivity. RCC raises a good point: Contracts that reveal trade secrets have historically been protected from disclosure to competitors in the past. See In re PacifiCorp, UE 116, Order No. 01-219 at 2-3 (providing heightened protection

<sup>&</sup>lt;sup>3</sup> While certain conditions may be imposed as part of our public interest finding, see TOPUC v. FCC, Oregon law does not permit service quality conditions to be imposed on wireless carriers at this time. ORS 759.450(8).

<sup>&</sup>lt;sup>4</sup> CGSA stands for Cellular Geographic Service Area. 47 CFR § 22.911.

for commercially sensitive contracts). In this instance, RCC has not yet been designated an ETC, and we do not yet know if it has received requests for service outside its CGSA. Therefore, demand for resale contracts are premature at this point. Staff recommended a reporting requirement to address this issue, which will take effect once RCC is designated as an ETC. RCC's proposalto submit an affidavit regarding resale contracts is acceptable. If we later encounter difficulties with customers unable to receive service outside RCC's CGSA boundaries, tougher requirements may be imposed at that time.

What is the competitive ETC's ability to satisfy its obligation to serve the designated service areas within a reasonable time frame? As RCC noted at oral argument, the order in Virginia Cellular was not issued until after the evidentiary record in this docket had closed. However, RCC has supplied informal plans to expand its service by building new cell sites in Prairie City, Bonanza, La Grande, and Ontario, See RCC/19, Gruis/15 at l. 3, and has agreed to Staff's proposed conditions to provide reports at the annual recertification process. The reports will detail how much federal USF support was received in the last year and how it was spent, and how much federal USF support is projected to be received in the next year and how it will be spent.

OTA argues that RCC has not provided enough in the way of specific plans to show how it will serve the area within a reasonable time frame. RCC replies that it does not have to serve the entire area – even rural ILECs do not have to serve every customer. RCC only has to serve customers who request service.

Staff is also concerned that a CETC demonstrate the commitment and ability to provide service to customers, should an incumbent local exchange carrier seek to relinquish its ETC designation. Staff notes that RCC is capable of serving as the carrier of last resort in the area in which it seeks ETC designation. Federal statute outlines the process by which an ETC can withdraw from an area. 47 USC § 214(e)(4). If an ETC were to withdraw, the other ETC would be given time to make arrangements to serve the customers in the designated area. Staff asserts that RCC would be able to fulfill these obligations should it become necessary.

RCC has set out a six-point checklist as to how it will answer every customer request: (1) determine whether the customer's equipment can be modified or replaced to provide acceptable service; (2) determine whether a roof-mounted antenna or other network equipment can be deployed at the premises to provide service; (3) determine whether adjustments at the nearest cell site can be made to provide service; (4) determine whether there are any other adjustments to network or customer facilities that can be made to provide service; (5) explore the possibility of offering resold service; and (6) determine whether an additional cell site, a cell-extender, or repeater can be employed, or can be constructed to provide service. RCC/19, Gruis/12-13. If none of those methods works, RCC will notify the customer and provide the Commission with an annual report of how many requests for service it could not fill. RCC's witness also testified, "To the extent that state law permits, the Commission will retain authority to

resolve any customer complaints that RCC has refused to respond to a reasonable request for service." RCC/19, Gruis/13 at 1. 11-13.

Other jurisdictions have counted this commitment by RCC as part of the public interest test; see In the Matter of the Request by Alaska Digitel, LLC for Designation as a Carrier Eligible to Receive Federal Universal Service Support Under the Telecommunications Act of 1996, U-02-39, Order No. 10, at 8-9, 2003 Alas PUC Lexis 377 (Reg Commn of AK, Aug 28, 2003); and we also add it to the weight of evidence that RCC's designation as an ETC is in the public interest.

What is the impact of the designation on the Universal Service Fund? We acknowledge OTA's concern that designation of additional ETCs creates a burden on the federal Universal Service Fund, but decline to take that factor into consideration. Even the FCC, standing in the shoes of the Virginia State Corporation Commission, did not give much weight to that factor. Instead, it noted that it had a pending rulemaking proceeding on the matter and declined to give any interim guidance. Virginia Cellular at ¶ 31. Accordingly, we will address this factor after the FCC has made a final decision, likely at the annual recertification process.

Does the designation of a competitive ETC raise "rural cream-skimming" issues? The FCC has addressed cream-skimming in its ETC designation orders:

Rural creamskimming occurs when competitors seek to serve only the low-cost, high revenue customers in a rural telephone company's study area. \* \* \* Creamskimming refers to the practice of targeting only the customers that are the least expensive to serve, thereby undercutting the ILEC's ability to provide service throughout the area.

In the Matter of Federal State Joint Board on Universal Service; RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area In the State of Alabama, DA 02-3181, 17 FCC Rcd 23532, 23543 ¶ 27 & 27 n 96 (released Nov 27, 2002) (RCC Holdings). We note that rural creamskimming is an issue only when the CETC will cover part of the rural ILEC's study area, see Highland Cellular at ¶ 26, in this case, CenturyTel and Sprint. See Appendix B.

Initially, OTA expressed concern about wire centers partially covered by RCC's application, a practice discouraged by the FCC in *Highland Cellular*. After preliminary briefing on that issue, RCC amended its application to withdraw from some wire centers only partially covered by its CGSA, and committed to cover the remainder of the others through resale agreements. *See* RCC Brief at 11 (May 10, 2004). In light of these circumstances, OTA again alerts us that RCC could be cream-skimming by only serving some wire centers within a study area, which was also discussed by the FCC in *Virginia Cellular* and *Highland Cellular*. RCC argues that an examination of the cost of serving each wire center, or, if that information is not available, an examination of the

density of each wire center,<sup>5</sup> will show that it is not serving only the least cost wire centers. This analysis only applies to CenturyTel and Sprint for purposes of this docket. Because Sprint has not opposed RCC's application, and Crater Lake is one of the highest cost exchanges in Sprint's territory, we apply the cream-skimming analysis only to CenturyTel's study area. *See* Appendix C.

CenturyTel serves exchanges from the Portland area, to the coast, to rural Eastern Oregon. The average cost per line in the area not to be served by RCC is \$46.70; the average cost per line in the area to be served by RCC is \$72.88. The average cost per line for CenturyTel is \$54.37. RCC committed to serve every CenturyTel wire center in the Eastern Oregon portion of its CGSA, and in fact declined to apply for ETC status in the lower cost CenturyTel wire centers in Western Oregon and the coast, including Lebanon, Gleneden Beach, Depoe Bay, Brownsville, Shedd, and Sweet Home. We recognize that it is possible that a CGSA boundary could naturally cream-skim the lowest cost wire centers. Again, this does not prove true in this instance. While RCC's CGSA does not include some of the highest cost wire centers, such as the cluster in Eastern Oregon that includes Mitchell, Spray, Heppner, Fossil, Ione, Lexington, and Boardman, the CGSA boundaries also do not cover the lowest cost wire centers, such as Aurora/ Charbonneau, Scappoose, Creswell, and Lebanon, among others. Viewed altogether, RCC's CGSA does not cream-skim wire centers within CenturyTel's study area.

Must USF support be spent in the area for which it was allocated? OTA recommends that we examine whether RCC will spend rural USF dollars in rural areas. There is no requirement that funds given for a particular customer must be reinvested in that particular customer's service area. We agree with OTA that RCC should not be permitted to build up its urban network under the guise of aiding rural customers, but we disagree with OTA's characterization of RCC's plan. OTA seeks to characterize any wire center covered by Qwest or Verizon as "non-rural," because those carriers are considered non-rural carriers under the Act. However, RCC's CGSA covers an area that is largely rural, and its plans for bolstering its facilities also cover areas that are quite rural, even if those areas are served by Qwest or Verizon. In the near term, RCC has committed to building cell sites in Bonanza, La Grande, Prairie City, and Ontario. See RCC/19, Gruis/15 at 1. 3.

Further, we note that RCC will only receive support funds for each customer it serves with its own facilities; RCC receives no funds for customers it serves through resale. If RCC wants to receive high cost support for customers served by rural ILECs, it will have to build up its network to serve those customers. In addition, RCC has a six-step plan in place to serve every customer that requests service or to report to this Commission why service to that customer is not reasonable. RCC/19, Gruis/12-13. We believe that the structure of the federal USF program provides incentives for RCC to

<sup>&</sup>lt;sup>5</sup> "Although there are other factors that define high-cost areas, a lower population density indicates a higher cost area." Highland Cellular at ¶ 28.

build its facilities to serve customers in rural Oregon, regardless of which ILEC currently serves that area.

Will CETC designation harm the rural ILEC and, in turn, its customers? OTA argues that some areas are so rural that it is improper to designate multiple ETCs for that area. Two arguments are built into that assertion: (1) designation of multiple ETCs will impose an unreasonable burden on the federal Universal Service Fund, and (2) designation of a CETC will harm the rural ILEC and, ultimately, customers. The first argument has already been addressed above. We turn to the second argument.

OTA asserts that competition for its own sake is not always good. We agree with that assessment, but there are many benefits that will come with competition in rural areas, such as "incentives to the incumbent to implement new operating efficiencies, lower prices, and offer better service to its customers." Wyoming Order, 16 FCC Rcd at 57 ¶ 22. We also disagree that this designation necessarily will harm rural ILECs and customers. That argument has been considered and rejected by multiple jurisdictions, including the FCC standing in for the South Dakota Public Utilities Commission:

[T]he federal universal service support mechanisms support all lines served by ETCs in high-cost areas. Therefore, to the extent that [the CETC] provides new lines to currently unserved consumers or second lines to existing wireline subscribers, it will have no impact on the amount of universal service support available to the incumbent rural telephone company for those lines that it continues to serve.

In the Matter of Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota, FCC 01-283, 16 FCC Rcd 18133, 18139 ¶ 15 (released Oct 5, 2001). RCC will provide wireless communications in these areas, a different service than traditional wireline local exchange service. No CETCs have yet been designated in Oregon. Again, we note that RCC will not receive any funds for serving a rural area unless it serves customers that live in that rural area. Accordingly, we reject OTA's arguments that CETCs should not be designated for rural Oregon.

Do the benefits outweigh the costs of ETC designation? Ultimately, each of the factors discussed above are calculated in a cost-benefit analysis. OTA cites the cost-benefit analysis used in *Virginia Cellular* at ¶ 4, which weighs competitive choice, impact of designation on the USF, the advantages and disadvantages of the service offering, quality of service commitments, and the applicant's ability to provide the supported services throughout the designated service area within a reasonable amount of time. As we have discussed, RCC's application would bring competition, spurring innovation; provide advantages through increased mobile wireless offerings; and offer the supported services to customers who request service in the designated area. We

acknowledge the costs of the application – a growing burden on the USF and no service quality guarantees – but believe that to the extent that those factors are an issue, they are more than outweighed by the benefits of granting the application. Therefore, we find that RCC's application for designation as an ETC in its designated area is in the public interest.

In addition to the above public interest test, Staff also recommends that RCC be required to file extensive reports as part of the annual recertification process. Specifically, Staff recommends that on or before July 15 of each year beginning in 2005, RCC report on the following items:

- 1. Line counts for federal USF supported services, itemized by rural ILEC wire center, as of December 31 of the preceding year.
- 2. The amount of federal USF support RCC received for operations in Oregon during the period January 1 through December 31 of the preceding year.
- 3. A description of how the federal USF support was used in the previous year. For expenses such as maintenance and provisioning, the information should be segregated by major expense category. For investments, this information should be segregated by asset type and the rural ILEC wire center where the investment was made.
- 4. An estimate of the federal USF support to be received during the current year and a detailed budget of how such support is expected to be used, as described in (3).
- 5. Documentation establishing RCC advertised the supported services throughout the entire designated area.
- 6. As to requests for service coming from areas within RCC's designated area, but outside its CGSA, a report listing the number of requests and, for requests where service was not provided, the reason(s) service was not provided.

We concur with Staff's recommendation to ensure that RCC follows through on the commitments that we relied on in finding that the application is in the public interest.

#### Redefinition of Study Areas

An ETC must serve entire service areas, not partial service areas. See 47 USC § 214(e)(1). For a "rural telephone company, service area means such company's 'study area' unless and until the Commission and the states \* \* \* establish a different definition of service area for such company." 47 CFR § 54.207(b). RCC argues that retaining current rural ILEC service areas imposes a barrier to competition in violation of the Act.

To resolve this situation, RCC recommends that we redefine the CenturyTel and Sprint service areas down to the wire center levels. As precedent, RCC cites the actions of the Washington Utilities and Transportation Commission. Petition for Agreement with Designation of Rural Company Eligible Telecommunications Carrier Service Areas and for Approval of the Use of Disaggregation of Study Areas for the

Purpose of Distributing Portable Federal Universal Service Support, Memorandum Opinion and Order, 15 FCC Rcd 9921, 9927-28 (released Sept 9, 1999) (Washington Redefinition Order).<sup>6</sup> First, this Commission would redefine the service area, then the FCC would need to approve the new arrangement. RCC proposes that we grant their application for ETC status conditionally upon FCC approval of the new service area.

The Joint Board initially recommended retaining service area boundaries that coincide with study area boundaries, for three reasons: (1) to prevent creamskimming; (2) because rural LECs are on a different footing than other carriers; and (3) rural LECs would bear an extra administrative burden to recalculate costs at something other than a study area level. *In the Matter of Federal-State Joint Board on Universal Service*, FCC 96J-3, 12 FCC Rcd 87, 180 ¶ 172-74 (released Nov 8, 1996). Those concerns are not present here. RCC's proposal does not cream-skim the low-cost customers in high-cost areas, as discussed above. Rural LECs are treated differently than other carriers, but in the interest of improving competition and service in rural areas, we believe that RCC's application for designation as an ETC should be granted. And CenturyTel has already calculated its costs at the wire center level, so that consideration is not present here. <sup>7</sup>

Even OTA agreed that if we found that the application is in the public interest and if there is no danger of cream-skimming, then OTA did not object to redefining the service areas along wire center boundaries. Accordingly, we agree with RCC that CenturyTel and Sprint's service areas should be redefined at the wire center level, and we will submit a petition to the FCC for final action in redefining the service areas.

#### CONCLUSIONS

After reviewing RCC's application, we conclude that RCC meets each of the statutory requirements to be designated an ETC: (1) it provides the nine supported

<sup>&</sup>lt;sup>6</sup> In the Washington Redefinition Order, the FCC approved a petition by the Washington Commission and twenty rural ILECs to redefine service areas down to the wire center level and to alter the way that USF support is calculated for those companies. The FCC found "it significant that the rural LEC petitioners support the proposed service area designation, conditioned on approval of the proposal to disaggregate support." Washington Redefinition Order at ¶ 9. No such agreement has yet been reached here, so we decline to redefine service areas for rural LECs not involved in this docket.

<sup>&</sup>lt;sup>7</sup> RCC also suggests that USF support should be disaggregated to the wire center level so that USF support can be more accurately targeted. CenturyTel chose Path 3 disaggregation and has established its support levels into two zones. See 47 CFR § 54.315; In the Matter of Applications to be Designated Eligible Telecommunications Carriers in the State of Oregon, UM 873, Order No. 02-335 (May 13, 2002). RCC argues that CenturyTel disaggregated its service area into 55 exchanges, and then improperly reaggregated into the two zones to discourage entry by competitive ETCs. We agree with RCC that this is not the place to address disaggregation proceedings, but we reserve the right to tackle this issue another time.

<sup>&</sup>lt;sup>8</sup> OTA's third requirement dealt with whether cream-skimming arose if RCC only covered part of a wire center. As RCC has amended its application to only cover whole wire centers, we do not address this issue.

services; (2) it advertises them; and (3) designation is in the public interest. Therefore, we grant RCC's application to serve as a CETC in the area designated in Appendix A. This designation is conditional on FCC approval of redefinition of the CenturyTel and Sprint service areas. To finalize the application, we will submit a petition for FCC agreement in redefinition of the service areas.

To determine the public interest, we consider the universal service goals of the Act, and particular issues raised by the parties and by jurisdictions that have considered federal ETC designations. We recognize that the Joint Board currently has a notice of proposed rulemaking in effect, and that public interest qualifications may change again as a result. Consequently, we may consider additional factors at the annual recertification for ETCs.

In addition, we conclude that CETCs, particularly wireless carriers, should be subject to rigorous annual recertification reporting requirements. ILECs designated as ETCs currently file extensive reports with the Commission as part of their regulated incumbent status. While we do not require ETCs to file similar reports, we do require that they file the reports as recommended by Staff, and listed in the ordering clauses, by July 15 of each year that they seek recertification, beginning in 2005.

#### **ORDER**

#### IT IS ORDERED that:

- 1. RCC's amended application for designation as an ETC is granted in compliance with the terms of this order. The designation is effective in the area specified in Appendix A and the wire centers listed in Appendix B.
- 2. As part of the annual recertification process, RCC shall file the following reports by July 15 of each year, beginning in 2005:
  - a. Line counts for federal USF supported services, itemized by rural ILEC wire center, as of December 31 of the preceding year.
  - b. The amount of federal USF support RCC received for operations in Oregon during the period January 1 through December 31 of the preceding year.
  - c. A description of how the federal USF support was used in the previous year. For expenses such as maintenance and provisioning, the information should be segregated by major expense category. For investments, this information should be segregated by asset type and the rural ILEC wire center where the investment was made.

- d. An estimate of the federal USF support to be received during the current year and a detailed budget of how such support is expected to be used, as described in (c).
- e. Documentation establishing RCC advertised the supported services throughout the entire designated area.
- f. As to requests for service coming from areas within RCC's designated ETC area, but outside its CGSA, a report listing the number of requests and, for requests where service was not provided, the reason(s) service was not provided.
- g. A description of actions taken to enhance wireless Internet service throughout the ETC area in the past year and plans to enhance such service in the current year;
- A description of how many service quality complaints were received, by wire center, and how those complaints were resolved;
- i. An affidavit from an RCC official stating that either:
  - RCC has resale agreements in place that cover the portions of wire centers that are within its ETC boundary but outside its CGSA; or
  - ii. RCC has not received any requests for service in portions of wire centers that are within its ETC boundary but outside its CGSA that are not covered by resale agreements.
- j. If RCC has received requests for service in portions of wire centers that are within its ETC boundary but outside its CGSA, RCC shall provide:
  - A description of the steps taken by RCC to obtain a resale agreement with other telecommunications service providers in order to provide service to the requesting parties;
  - ii. Whether each party requesting service eventually received such service via RCC acting in the capacity of a reseller; and
  - iii. RCC's estimated timeframe for negotiating resale agreements in each wire center where it was unable to accommodate a request for service because RCC had no existing resale agreement in place.
- k. If certification of a resale agreement is made and someone challenges the existence of an agreement, Staff will conduct an *in camera* review to confirm the accuracy of certification. RCC will be asked to provide this information with the understanding that such a review would be covered by a nondisclosure agreement or through the use of Commission subpoena and protective order to preserve the confidentiality of the resale agreement.

3. The Commission shall submit a petition for FCC agreement with redefinition of CenturyTel and Sprint service areas and communicate RCC's designation as an ETC by June 30, 2004.

Made, entered, and effective _	
Lee Beyer	John Savage
Chairman	Commissioner
	Ray Baum
	Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.

UM 1083 Appendix B

# Wire centers served by non-rural carriers

ILEC carrier	Wire Center
Qwest	Albany
Owest	Ashland
Owest	Athena
Qwest	Baker
Qwest	Bend
Owest	Black Butte
Qwest	Blue River
Qwest	Corvallis
Qwest	Dallas
Qwest	Eugene
Qwest	Florence
Qwest	Grants Pass
Qwest	Harrisburg
Qwest	Hermiston
Qwest	Independence
Qwest	Junction City
Qwest	Klamath Falls
Qwest	La Pine
Qwest	Leaburg
Qwest	Lowell
Qwest	Madras
Qwest	Mapleton
Qwest	Marcola
Qwest	Milton Freewater
Qwest	Newport
Qwest	Oakridge
Qwest	Pendleton
Qwest	Prineville
Qwest	Redmond
Qwest	Salem
Qwest	Siletz
Qwest	Sisters
Qwest	Springfield
Qwest	Standfield
Qwest	Toledo
Qwest	Umatilla
Qwest	Veneta

Qwest 12 - 12 - 15	
Qwest	Woodburn

Verizon	Aumsville/Turner
Verizon	Coquille
Verizon	Cove
Verizon	Dayton
Verizon	Detroit
Verizon	Elgin
Verizon	Enterprise
Verizon	Gand Island
Verizon	Imbler
Verizon	Joseph/Imnaha
Verizon	La Grande
Verizon	Lostine
Verizon	Mill City
Verizon	Silverton
Verizon	Union
Verizon	Wallowa
Verizon	Yamhill

Wire centers served by rural carriers – entire study area to be served by RCC9

ILEC carrier	Wire Center	Comments <sup>10</sup>
Asotin	Flora-Troy	Commits to serve entire wire center
Eagle	Richland	Already serves entire wire center
Helix	Helix	Already serves entire wire center
Helix	Meacham	Already serves entire wire center
Malheur	Nyssa	Already serves entire wire center
Malheur	. Ontario	Already serves entire wire center
Malheur	Vale	Already serves entire wire center
Mid Vale	Harper	Already serves entire wire center
Mid Väle	Juntura	Already serves entire wire center
Oregon Tel.	Bates	Already serves entire wire center
Oregon Tel.	Dayville	Already serves entire wire center
Oregon Tel.	Hereford-Unity	Already serves entire wire center
Oregon Tel.	Mount Vernon	Already serves entire wire center
Oregon Tel.	Prairie City	Already serves entire wire center
Pine Tel.	Granite	Already serves entire wire center

<sup>&</sup>lt;sup>9</sup> We differentiate between RCC's coverage of an entire study area as opposed to the partial study area of a rural ILEC, for multiple reasons. First, we apply a cream-skimming analysis to CETC coverage of a partial study area and not to coverage of an entire study area. Second, redefinition of the rural ILEC's service area, with FCC agreement, is required where a CETC has only partial study area coverage.

<sup>10</sup> Where RCC already serves an entire wire center, it does so with its own facilities. Where RCC commits

<sup>&</sup>lt;sup>10</sup> Where RCC already serves an entire wire center, it does so with its own facilities. Where RCC commits to serve an entire wire center, it will cover part with its own facilities and the rest with resale agreements or additional facilities to be added later.

Pine Tels:	Halfway: Already serves entire wire center:	
Pine Tel	Oxbow Already serves entire wire center.	
Pine Tel.	Stices Gulch Already serves entire wire center	

# Wire centers served by rural carriers – partial study area to be served by RCC

ILEC carrier	Wire Center	Comments
Century Tel	Bly	Already serves entire wire center
Century Tel	Bonanza	Commits to serve entire wire center
Century Tel	Burns	Already serves entire wire center
Century Tel	Chemult	Already serves entire wire center
Century Tel	Chiloquin	Already serves entire wire center
Century Tel	Durkee	Already serves entire wire center
Century Tel	Echol	Commits to serve entire wire center
Century Tel	Fort Klamath	Already serves entire wire center
Century Tel	Gilchist 55	Commits to serve entire wire center.
Century Tel.	Harney	Commits to serve entire wire center.
Century Tel	Huntington	Already serves entire wire center
Century Tel	John Day	Already serves entire wire center
Century Tel	Lakeview	Already serves entire wire center
Century Tel	Long Creek	Already serves entire wire center
Century Tel	Malin	Commits to serve entire wire center
Century Tel	Memill	Already serves entire wire center
Century Tell 1	Monument	Commits to serve entire wire center
Century Tel	North Powder	Already serves entire wire center
Century Tel	Paisley: 12	Already serves entire wire center
Century Tel	Paulina :	Already serves entire wire center
Century Tel	Pilot Rock/Starkey	Already serves entire wire center
Century Tel	Rocky Point	Already serves entire wire center
Century Tel	Seneca	Already serves entire wire center
Century Tel	Silver Lake	Already serves entire wire center
Century Tel	Sprague River	Already serves entire wire center
Century Tel	Ukiah	Already serves entire wire center
Sprint/United	Crater Lake	Commits to serve entire wire center

UM 1083 Appendix C

# Century Tel wire centers not covered by RCC's application

Wire Center	Density (access lines/ sq mi)	Cost (cost per mo by WC)
Aurora	142.69	\$121,593.29
Charbonneau	N/A	\$53,680.56
Boardman	5.74	\$83,543.77
Brownsville	11.78	\$76,607.71
Camas Valley	5.58	\$36,237.68
Creswell	61.35	\$121,223.76
Depoe Bay	49.24	\$61,771.23
Drain	11.45	\$87,998.46
Fossil	1.47	\$43,615.75
Gleneden Beach	167.07	\$99,293.31
Glide	6.93	\$104,936.60
Government Camp	12.35	\$96,275.20
Heppner	1.50	\$83,588.33
Ione	0.89	\$32,484.24
Jewell	2.03	\$107,008.61
Knappa	17.34	\$83,791.33
Lebanon	53.41	\$482,450.01
Lexington	1.89	\$27,533.38
Maupin	1.65	\$24,300.38
Mitchell	0.34	\$45,172.11
North Umpqua	0.99	\$26,966.18
Pine Grove	1.33	\$17,657.84
Scappoose	72.17	\$213,151.71
Shedd	7.43	\$28,136.87
Spray	0.99	\$38,176.99
Sweet Home	7.62	\$259,755.26
Tygh Valley	2.78	\$23,069.94
Wamic	4.71	\$63,333.45
Yoncalla	6.41	\$81,895.19
TOTAL	7.93	\$46.70/ access line

# Century Tel wire centers covered by RCC's application

Wire Center	Density (access lines/ sq mi)	Cost (cost per mo by WC)
Bly	0.93	\$29,681.45
Bonanza	3.24	\$129,155.52
Burns	14.51	\$140,553.48
Chemult	1.33	\$26,706.87
Chiloquin	1.19	\$139,417.44
Durkee	0.52	\$21,418,90
Echo		7 \$39,738.95
Fört Klamath	128	F12 524-407498
Gilchrist, A.	医黄性细胞 高温性 计图2.50	\$1.04,562,452
Hamey	Maria 1971 1971 1971 1971 1971 1971 1971 197	\$131,514.08
Huntington	3.14	\$23,901.74
John Day	14.54	\$90,535.72
Lakeview	3.80	\$140,808.12
Long Creek	0.33	\$41,017.55
Malin	6.98	\$40,837.34
Merrill		17.5 FEB. 18.4843.974.95
Monument	10.82 mg/s	## \$36,106.56;
North Powder	(4) The state of the 1190 of t	1.548,340.41
(Paisley)	0.76	\$33\598\51L
Paulina	四重工作的第三人称单数	575 - 175 - 176 - 176 - 1848 -
Pilot Rock	1.70	\$92,013.82
Rocky Point	4.00	\$25,158.20
Seneca	0.84	\$17,567.52
Silver Lake	0.31	\$133,002.59
Sprague River	1.80	\$86,834.19
Starkey	guara (11) 10.92	Eras Eras Eras Maria N/A
(Ukiah)	035	\$13,250.78
TOTAL	1.22	\$72.88/access line

APPENDIX C

# STATE OF VERMONT PUBLIC SERVICE BOARD

1	D٥	ck	et	No	· 6	9	34	1

DOCKOL 110. 0754	
Petition of RCC Atlantic Inc. for designation as an Eligible Telecommunications Carrier in areas served by rural telephone companies under the Telecommunications Act of 1996	<ul><li>Hearings at</li><li>Montpelier, Vermont</li><li>August 2 and 3, 2004</li></ul>
	Order entered: 9/29/2004
	Dworkin, Esq., Chairman irke, Esq., Board Member
Peter M. B	luhm, Esq., Hearing Officer
APPEARANCES: John Cotter for Vermo	r, Esq. ont Department of Public Service
•	•

David LaFuria, Esq. Lukas, Nace Gutierrez & Sachs, Chartered for RCC Atlantic, Inc., d/b/a Unicel

Cassandra LaRae-Perez, Esq. Paul J. Phillips, Esq. Primmer and Piper, P.C.

for Franklin Telephone Company; Ludlow Telephone Company; Northfield Telephone Company; Perkinsville Telephone Company; STE/NE Acquisition Corp., d/b/a Northland Telephone Company of Vermont, d/b/a Fairpoint New England; Shoreham Telephone Company, Inc; Topsham Telephone Company, Inc.; Vermont Telephone Company, Inc., d/b/a Vtel; and Waitsfield-Fayston Telephone Company, Inc., d/b/a Waitsfield Telecom, d/b/a Champlain Valley Telecom

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# I. SUMMARY

In Docket 5918, RCC Atlantic, Inc., d/b/a Unicel ("RCC"), was designated as an Eligible Telecommunications Carrier ("ETC") in 93 exchange areas ("wire centers") comprising all of the area currently served by Verizon New England Inc., d/b/a Verizon Vermont ("Verizon-Vermont"). Here, RCC seeks designation in the areas served by Vermont's Independent Telephone Companies (the "ITCs"), thereby extending its designation to cover the entire state.

This Decision finds that RCC satisfies the federal criteria for designation and that designation is in the public interest and designates RCC as an ETC, with a single service area consisting of all wire centers in Vermont, through December 31, 2005, the same date on which RCC's designation will expire under Docket No. 5918.

This Decision also imposes several conditions on RCC relating to extending service and defining RCC's responsibilities under a number of existing Public Service Board ("Board") dockets and rules.

#### II. PROCEDURAL HISTORY

On March 11, 2004, RCC petitioned the Board, pursuant to Section 214(e)(2) of the Telecommunications Act of 1934, as amended (the "Act"),<sup>2</sup> and Federal Communications Commission ("FCC") rules,<sup>3</sup> asking that the Board designate RCC as an ETC in the areas served by the ITCs. Along with its petition, RCC filed the direct testimony of Elizabeth L. Kohler and a supporting memorandum.<sup>4</sup>

In Docket 5918, the Board has previously designated RCC as an ETC in all areas served

<sup>1.</sup> Vermont's Independent Telephone Companies are: Vermont Telephone Company, Inc., d/b/a Vtel; Waitsfield-Fayston Telephone Company, Inc., d/b/a Champlain Valley Telecom and d/b/a Waitsfield Telecom; Topsham Telephone Company, Inc.; STE/NE Acquisition Corp. d/b/a Northland Telephone Company of Vermont, d/b/a Fairpoint New England; Ludlow Telephone Company; Northfield Telephone Company; Perkinsville Telephone Company; Franklin Telephone Company; and Shoreham Telephone Company, Inc. (collectively the "ITCs").

<sup>2. 47</sup> U.S.C. § 214(e)(2).

<sup>3. 47</sup> C.F.R. § 54.201.

<sup>4.</sup> The supporting memorandum is treated herein as an integral part of the petition.

by Vermont's sole non-rural carrier, Verizon-Vermont.<sup>5</sup> In seeking here to expand its designation into the areas served by all of Vermont's rural telephone companies,<sup>6</sup> RCC effectively seeks ETC designation for the entire state of Vermont<sup>7</sup>

On March 18, 2004, the ITCs filed a motion to intervene, which was granted.<sup>8</sup> The Department of Public Service (the "Department" or "DPS") also participated.

A status conference was held on April 14, 2004. John Marshall, Esq. and Suzanne Monte, Esq. appeared on behalf of RCC. John J. Cotter, Esq. appeared on behalf of the Department. Cassandra LaRae-Perez, Esq. appeared on behalf of the ITCs. At that conference, the parties discussed and proposed a schedule for proceeding with the docket.

The Hearing Officer, based upon recommendations from the parties, issued a Procedural Order, on April 21, 2004, establishing a schedule for consideration of RCC's petition. The Order prescribed a discovery schedule and directed the filing of direct testimony by the Department and the ITCs and the filing of rebuttal testimony by RCC. That Order also asked RCC to file a map of its existing and any proposed cell-tower locations on June 1, 2004. On June 15, at the request of the Department, the Hearing Officer issued another Procedural Order authorizing rebuttal testimony by all parties. A Protective Order for confidential information was also issued on June 15, 2004. A third Procedural Order was issued on July 7, 2004, granting the motion of RCC to maintain under seal and treat as confidential an exhibit to the prefiled testimony of Mr. Douglas Meredith on behalf of the ITCs previously filed under seal in

<sup>5.</sup> Docket 5918, Order of 6/26/03 and amended by Order of 11/14/03. In Vermont, this effectively translates into the service area served by Verizon-Vermont. See Docket 5918, Order of 11/14/03 at finding 10.

<sup>6.</sup> Memorandum Supporting Application (Supporting Memo) at 1-3.

<sup>7.</sup> See exh. A to Supporting Memo.

<sup>8.</sup> The ITCs' Motion to Intervene was granted by Board Order dated 4/1/04. See Docket 6934, Order Opening Investigation, Granting Intervention and Admission, and Notice of Hearing dated 4/1/04 at 2.

<sup>9.</sup> Order of 4/21/04.

<sup>10.</sup> As requested by the ITCs, we note that the ITCs had one round of discovery on RCC. See ITC Comments of 9/13/04 at 4

<sup>11.</sup> The ITCs elected not to file any written rebuttal testimony. See letter of 7/14/04 from Cassandra LaRae-Perez, Esq. to Susan M. Hudson, Clerk of the Board.

<sup>12.</sup> Order of 6/15/04.

discovery.13

Technical hearings were held on August 2 and 3, 2004. The parties filed briefs, proposed findings or proposed decisions on or before August 18, 2004. With permission of the Hearing Officer, on August 26, 2004, the ITCs filed a reply brief.

A Proposal for Decision was circulated on September 3, 2004, in accordance with 3 V.S.A. § 811 and 30 V.S.A. § 8. The parties filed written comments, and the Board heard oral argument on September 15, 2004. At the request of the Board, the parties filed supplemental comments on September 20, 2004.

The case is now ready for decision. The findings and conclusions below are based upon the proposed decision issued by the Hearing Officer, with adjustments to reflect the written and oral comments of the parties. A comparison draft showing changes from the Hearing Officer's Proposed Decision is available upon request to the Clerk.

#### III. LEGAL STANDARD

Before a "telecommunications carrier" <sup>14</sup> may receive federal universal-service support, it must first be designated as an "Eligible Telecommunications Carrier." <sup>15</sup> The Vermont Public Service Board has authority under the Telecommunications Act of 1996<sup>16</sup> ("the Act") to designate ETCs in Vermont. The Act also prescribes many of the standards for such certifications ("ETC Requirements"). <sup>17</sup>

A carrier seeking designation must show that it offers nine services: voice grade access to the public switched network; local usage; dual tone multi-frequency signaling or its equivalent; single-party service; access to emergency services; access to operator services; access to

<sup>13.</sup> Order of 7/7/04.

<sup>14. &</sup>quot;Telecommunications carrier" is defined by 47 C.F.R. § 54.5.

<sup>15. 47</sup> U.S.C. § 214(e); 47 C.F.R. § 54.201.

<sup>16. 47</sup> U.S.C. § 214(e)(2); 47 C.F.R. § 54.201. If a state commission does not have authority to designate ETCs, the FCC will act in its stead. *E.g.*, Federal State Joint Board on Universal Service, RCC Holdings, Inc., Wireline Competition Bureau, Memorandum Opinion and Order, released Nov. 27, 2002, ¶ 12.

<sup>17.</sup> The standards are found generally in 47 C.F.R. § 54.101 et seq.

interexchange service; access to directory assistance; and toll limitation.<sup>18</sup> These nine services must be offered throughout the service area for which the designation is received, either using the ETC's own facilities or a combination of its own facilities and resale of another carrier's services.<sup>19</sup> The ETC must also advertise the availability of these services and the charges for those services using media of general distribution.<sup>20</sup>

This docket involves areas of Vermont served by rural telephone companies.<sup>21</sup> In such cases, the Board cannot designate a competitive telecommunications carrier as an ETC ("CETC") unless it first finds that designation is "in the public interest."<sup>22</sup> This weighing of likely benefits and costs should be a "fact-specific exercise."<sup>23</sup> If the Board grants ETC status, it must also define a "service area" within which the ETC designation applies.

The Board cannot require, as a prerequisite to designation, that RCC provide service throughout its entire proposed service area. This would effectively preclude designation of new entrants as ETCs in violation of the intent of Congress.<sup>24</sup> The Board can, however, require the applicant to demonstrate a "capability and commitment" to serve throughout that entire service area.<sup>25</sup> This phrase, which runs through subsequent FCC decisions, requires more than a vague

<sup>18. 47</sup> C.F.R. § 54.101(a) & (b).

<sup>19. 47</sup> U.S.C. § 214(e)(1); 47 C.F.R. §54.201(d).

<sup>20. 1</sup>d.

<sup>21.</sup> Each of the ITCs is considered a "rural telephone company" under the Act.

<sup>22. 47</sup> U.S.C. § 214(e)(2); 47 C.F.R. § 54.201(c). The "public interest" standard for areas served by rural telephone companies is contained in the third sentence of 47 U.S.C. § 214(e)(2). It prohibits designation unless the state commission finds that designation to be in the public interest. The second sentence of that same section applies more broadly to all applications for designation as an additional ETC, and it directs state commissions to grant designation "consistent with the public interest, convenience, and necessity." Although both sentences apply here, we consider the two tests identical for present purposes. For convenience, the following discussion refers simply to the "public interest standard."

<sup>23.</sup> See Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier for the State of Virginia, CC Docket No. 96-45, Memorandum and Opinion and Order, FCC 03-338 (rel. Jan. 22, 2004), para. 28 ("Virginia Cellular").

<sup>24.</sup> Federal State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling, FCC 00-248, rel. 8/10/00 ("South Dakota Preemption Order").

<sup>25.</sup> See generally, ITC Reply Brief at 4-5.

assertion of the carrier's intent to serve.<sup>26</sup>

In one recent decision, the FCC said that a "more stringent public interest analysis" is required when considering the designation of additional ETCs in rural study areas.<sup>27</sup> Effectively reversing precedent, the FCC found that the value of increased competition does not by itself satisfy the public interest test. Instead, the FCC evaluated several additional factors, including: the impact of multiple ETC designations on the Universal Service Fund, unique advantages and disadvantages of the applicant's service offering, commitments by the applicant to the quality of telephone service to be provided, and the applicant's ability to provide the supported services throughout the designated area within a reasonable time frame. According to the FCC, an applicant for ETC status must make a "reasonable demonstration . . . of its *capability and commitment* to provide universal service."<sup>28</sup> There must also be some assurance that the CETC applicant can "satisfy its obligation to serve the designated service areas within a reasonable time frame."<sup>29</sup>

The Joint Board has also recommended adopting more rigorous standards for ETC designations,<sup>30</sup> although those recommendations have not yet been acted on by the FCC. One of the Joint Board's recommendations is that the FCC:

adopt a guideline encouraging state commissions to require ETC applicants to demonstrate their capability and commitment to provide service throughout the designated service area to all customers who make a reasonable request for service.<sup>31</sup>

Specifically, the Joint Board suggests that such a demonstration might include "requiring a formal build-out plan for areas where facilities are not yet built out at the time the ETC application is considered."<sup>32</sup>

<sup>26.</sup> Id., para. 24.

<sup>27.</sup> See Virginia Cellular, para. 4.

<sup>28.</sup> Virginia Cellular, para. 17 (citation omitted)(emphasis added).

<sup>29.</sup> Virginia Cellular, para. 4.

<sup>30.</sup> Federal-State Joint Board on Universal Service, Recommended Decision, FCC 04-J1, released 2/27/04.

<sup>31.</sup> Id., para. 23.

<sup>32.</sup> Id. para. 24.

RCC is a wireless or "CMRS" carrier.<sup>33</sup> Under the Act, state or local governments generally may not regulate the entry of or the rates charged by CMRS providers.<sup>34</sup> States may regulate other terms and conditions of CMRS, such as customer billing practices and consumer protection requirements. States may also impose on CMRS providers requirements related to universal service, so long as they do not amount to rate or entry regulation.

#### IV. Positions of the Parties

RCC and the Department support designation as an ETC. They claim that RCC provides the nine required services in the area served by the ITCs, and properly advertise those services. They also maintain that the public interest would be served by a designation. They prefer that the Board create one or two "service areas" in which RCC will serve. The Department recommends numerous conditions to the designation.

The ITCs oppose designation, claiming that RCC is ineligible because it does not meet FCC standards for E-911 service. The ITCs also contend that RCC has failed to prove that designation of RCC as an ETC is in the public interest. Finally, if the Board should nevertheless grant designation, the ITCs ask the Board to designate RCC as an ETC separately in nine separate rural study areas, one for each of the nine ITCs.

#### V. COMPANY BACKGROUND

#### **Findings**

- 1. RCC provides certain telecommunications services in Vermont, within the meaning of Section 203(5) of Title 30 of the Vermont Statutes Annotated, owns and operates public-service property in connection therewith within the meaning of Section 201 of Title 30, and therefore is subject in certain respects to the Board's jurisdiction. Pet. at ¶ 1.
- 2. RCC holds a Certificate of Public Good to provide telecommunications services in Vermont, issued in Docket No. 6072. <u>Id.</u>

<sup>33. &</sup>quot;CMRS" means "commercial mobile service." The "R" in the acronym implies "radio," but is not a statutory term. See 47 U.S.C. § 153(27).

<sup>34.</sup> See 47 U.S.C. § 332(c)(3).

- 3. RCC is a Minnesota corporation registered to do business in the State of Vermont as a foreign corporation and operates in Vermont under the tradename "Unicel." <u>Id.</u>
- RCC's regional headquarters are located in Colchester, Vermont. Supporting Memo at
- 5. RCC is a wholly-owned subsidiary of Rural Cellular Corporation (herein "Rural Cellular"), which is a publicly-traded company with over 111,000 telecommunications-service subscribers that operates (with its affiliates) "commercial mobile radio services" (PCS, cellular, and paging, collectively referenced as "CMRS"). RCC operates in 14 states. Pet. at ¶ 2; tr. 8/2/04 at 9 (Kohler).
- 6. RCC is a CMRS provider within the meaning of "mobile service" as defined by Section 153(27) of Title 47, United States Code, and provides telecommunications services as defined in Section 254(d) thereof and Section 54.703(a) of the Code of Federal Regulations. Pet. at ¶ 3; Supporting Memo at 2.
- 7. RCC is licensed to serve the entire State of Vermont and provides service in the Burlington, Vermont Cellular Geographic Service Area, the Vermont One Rural Service Area, and the Vermont Two Rural Service Area. Supporting Memo at 1-2.
- 8. RCC is a telecommunications carrier as defined by Section 153(44) of Title 47 and Section 51.5 of the Code of Federal Regulations, is a telecommunications carrier for the purposes of Part 54 of the FCC's rules, and therefore is considered to be a common carrier under the Act. Supporting Memo at 2.
- 9. RCC has the financial resources and ability to provide quality services throughout the proposed Service Area; RCC is a publicly-traded company that has invested over \$39 million into Vermont and currently has over 100,000 lines of service in this state. Supporting Memo at 21.

#### VI. THE NINE REQUIRED SERVICES

The services supported by the federal Universal Service Fund ("USF") are: (a) voice-grade access to the public-switched network; (b) local usage; (c) dual-tone, multi-frequency signaling or its functional equivalent; (d) single-party service or its functional equivalent;

(e) access to emergency services; (f) access to operator services; (g) access to interexchange service; (h) access to directory assistance; and (i) toll limitation for qualifying low-income consumers.<sup>35</sup> Each of the nine points is considered separately below.

# A. Voice Grade Access to the Public Switched Network

# **Findings**

- 10. RCC provides voice-grade access to the public-switched network through use of its own facilities and interconnection arrangements with local telephone companies. As required by FCC rules, this service transmits voice-generated sound waves in the frequency band from 300 to 3,000 Hertz. Supporting Memo at 4; Lackey pf. at 7.
- 11. In July of 2003, the FCC began requiring measurement of hearing-aid compatibility and labeling of cell phones. Frankel reb. pf. at 3.
- 12. RCC's digital handsets are not hearing aid compatible because their radio emissions interfere with the operation of many hearing aids. Meredith pf. at 18.
- 13. The record does not disclose whether RCC informs potential customers with hearing aids that digital phones are incompatible with many hearing aids or whether RCC has a written policy on this point. Tr. 8/3/04 at 71 (Frankel).
- 14. No commercially-available digital receivers on the market today are compatible with certain hearing aids. At least one Motorola phone offered by RCC (the T720) is currently capable of connecting with a Telecoil hearing aid and is compatible with a "neckloop" that reduces interference by moving the phone away from the hearing aid, thereby improving the quality. Kohler reb. pf. at 33; Frankel reb. pf. at 4.
- 15. To give manufacturers of digital equipment time to resolve the issues of hearing-aid compatibility with digital phones, while still affording hearing-impaired persons access to wireless service, the FCC adopted a five-year transition period from analog to digital. Carriers, including RCC, that offer digital wireless service are required to make analog service available to subscribers within their licensed service area until the end of the five-year sunset period, ending

<sup>35. 47</sup> C.F.R. § 54.101(a).

on February 18, 2008. Kohler reb. pf. at 34; Frankel reb. pf. at 3; see 47 C.F.R. § 22.901(b); 47 U.S.C. § 214(e)(1); tr. 8/2/04 at 128, 138-39 (Kohler).

16. Analog wireless phones are hearing-aid compatible and can be used on RCC's network. RCC plans to support analog service for a foreseeable time into the future. However, analog service may not be available on some new sites, and may not be available in some parts of Burlington. New analog telephone handsets are not available, but RCC occasionally can provide a used analog handset to a customer who needs one. The FCC is making efforts to ensure the availability of analog handsets until the transition period ends. Kohler reb. pf. at 33-34; Frankel pf. rebuttal at 2-5; tr. 8/2/04 at 128, 134-38 (Kohler).

17. RCC has committed here to provide digital receivers to hearing-impaired subscribers as soon as they become available. Kohler reb. pf. at 33.

## Discussion

"Voice grade access" is defined as a "functionality that enables a user of telecommunications services to transmit voice communications, including signaling the network that the caller wishes to place a call, and to receive voice communications, including receiving a signal indicating there is an incoming call." For the purposes of Part 54, bandwidth for voice grade access should be, at a minimum, 300 to 3,000 Hertz.<sup>36</sup>

The record shows that RCC provides its customers with voice-grade access to the public switched network. RCC achieves this through use of its own facilities and through its interconnections to other carriers.

The ITCs contend that RCC does not provide appropriate access to the public switched network because its digital handsets are not hearing aid compatible. This problem is not unique to RCC, however, and the record shows that all currently available digital handsets can interfere with hearing aids.

RCC's analog handsets are hearing aid compatible, and RCC complies with FCC regulations regarding digital handset compatibility with hearing aids. Moreover, hearing-impaired service is not, per se, a required service, although it is relevant to the public

<sup>36. 47</sup> C.F.R. § 54.101(a)(1).

interest test, discussed below.

We conclude that RCC should not be denied ETC status in Vermont because of a failure of the entire wireless industry to manufacture hearing aid-compatible handsets. Moreover, RCC has committed to make hearing aid-compatible digital handsets available to its customers as soon as vendors make them commercially available.<sup>37</sup>

# B. Local Usage

## **Findings**

- 18. RCC offers a wide variety of rate plans that include some amount of calling without additional or separate charge within the home service area. From the customer's perspective, the price of some initial quantity of usage is built-in to the monthly fixed price. Lackey pf. at 7.
- 19. If the FCC does designate a specific local usage requirement, RCC has committed to comply with that requirement. Supporting Memo at 5-6; Lackey pf. at 7-8.

## Discussion

"Local usage" is defined as the "amount of minutes of use of exchange service, prescribed by the Commission, provided free of charge to end users."<sup>38</sup> Unfortunately, this definition is doubly meaningless. First, although the rule has been in effect since 1998, the FCC has never actually prescribed a minimum quantity of local usage.<sup>39</sup> Second, it is difficult to know what the FCC means by "exchange service," either generally<sup>40</sup> or particularly with regard to wireless communications which often do not utilize "local" calling areas as normally understood in wireline communications.

<sup>37.</sup> Kohler pf. rebuttal at 34.

<sup>38. 47</sup> C.F.R. § 54.101(a)(2).

<sup>39.</sup> Supporting Memo at 5.

<sup>40.</sup> The Rule does not define the term "exchange service." See 47 C.F.R. § 54.5 (terms and definitions).

"Telephone exchange service" is defined in the Act, however, as "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." See 47 U.S.C. § 153(47).

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Notwithstanding these problems, we conclude that RCC has made a reasonable demonstration of its capability and commitment to provide local usage. First, competitive neutrality supports a finding of compliance. The basic exchange service offerings of many incumbent Local Exchange Carriers ("LECs") in Vermont require a per-minute payment for local usage ("Local Measured Service"). Some also sell, for an additional charge, optional packages of local usage minutes. If the incumbent LECs' basic exchange service offerings satisfy the local usage criterion, there is no reason to conclude that RCC's offerings do not.<sup>41</sup>

Second, RCC's future intentions are also apparently relevant. The FCC recently found an applicant's commitment to comply with any future FCC local usage requirements sufficient to obtain ETC designation.<sup>42</sup> RCC has made a similar commitment here.

# C. Dual-Tone, Multi-Frequency Signaling

## **Findings**

20. RCC provides dual-tone, multi-frequency ("DTMF") signaling by using out-of-band, digital signaling and in-band, multi-frequency ("MF") signaling that is functionally equivalent to DTMF signaling. Supporting Memo at 6; Lackey pf. at 8.

## Discussion

"Dual tone multi-frequency" (DTMF) is defined as a "method of signaling that facilitates the transportation of signaling through the network, shortening call set-up time."<sup>43</sup> It is undisputed that RCC satisfies this requirement.

# D. Single-Party Service or its Functional Equivalent

# **Findings**

21. RCC offers single-party service or its functional equivalent. Supporting Memo at 6; Lackey pf. at 8.

<sup>41.</sup> See Lackey pf. at 7-8.

<sup>42.</sup> Virginia Cellular, para. 20 (January 22, 2004).

<sup>43. 47</sup> C.F.R. § 54.101(a)(3).

# Discussion

"Single-party service" is defined as "telecommunications service that permits users to have exclusive use of a wireline subscriber loop or access line for each call placed, or, in the case of wireless telecommunications carriers, which use spectrum shared among users to provide service, a dedicated message path for the length of a user's particular transmission." 47 C.F.R. § 54.101(a)(4). It is undisputed that RCC satisfies this requirement.

# E. Access to Emergency Services

## **Findings**

- 22. RCC currently provides 911 access to emergency services throughout its service territory. Supporting Memo at 6; Lackey pf. at 8-9.
- 23. Enhanced 911 ("E-911") provides locational information to the Public Safety Answering Points. The local governments in Vermont requested Phase II E911 services prior to 2003. Meredith pf. at 12.
- 24. RCC has deployed E-911 in its network. Today, RCC passes caller-location data to Public Safety Answering Points that request it. Kohler reb. pf. at 30.; tr. 8/2/04 at 239 (Wood).
- 25. RCC has stated a commitment to comply with all E-911 requirements. Supporting Memo at 6.
- 26. RCC currently offers analog and a digital "TDMA" (time division multiplexing) service. There is very little new development of TDMA services. RCC has decided to migrate to a "GSM" technology digital service, which is a "third generation" technology. With GSM, RCC will continue to offer all the current functions of voice service, but also will offer improved data services, initially with speeds of approximately 115 kilobits per second and ultimately with speeds of approximately 500 kilobits per second. Kohler reb. pf. at 14; tr. 8/2/04 at 127-28, 135 (Kohler).
- 27. Carriers using digital CDMA (code division multiplexing) technology can offer consumers handsets that include a Global Positioning System (or "GPS") chip that can locate the handset within a narrow range. Kohler reb. pf. at 30.
  - 28. No GSM digital technology device currently contains a GPS chip. GSM carriers must

instead use a network solution that "triangulates" a consumer's location in relation to three cell towers. The accuracy varies depending upon technical factors including the number of towers deployed near the handset to be located. In rural areas, accuracy is limited by the smaller number of available towers. Vendors offering network-based solutions have not been able to deliver in rural areas accuracy levels that match urban areas. All carriers using GSM have this same problem, including Cingular, AT&T Wireless and T-Mobile. Kohler reb. pf. at 30-31.

- 29. Because it intends to use GSM technology, RCC has chosen a "network-based solution" for Phase II E-911 service in Vermont. This service depends upon triangulation from multiple towers. Kohler reb. pf. at 30; Meredith pf. at 14; tr. 8/2/04 at 127-28 (Kohler).
- 30. As of May of 2003, the FCC required RCC to provide "Phase II 911 enhanced service" to at least "50 percent of [its] coverage area or 50 percent of [its] population." RCC deployed equipment to meet this requirement. On March 1, 2004, the FCC further required RCC to provide "Phase II 911 enhanced service" to "100 percent of [its] coverage area or 100 percent of [its] population." RCC does not meet the new 100 percent standard. 47 C.F.R. § 20.18(f); Meredith pf. at 13-15; exhs. ITC-5 at 4, ITC-6 at 26, ITC-7, at 3.
- 31. Building more towers would improve triangulation and the accuracy of RCC's network. In rural areas there is often not enough capacity demand to justify enough towers to triangulate. Kohler reb. pf. at 31-32.
- 32. When determining compliance with Phase II locational accuracy requirements, the FCC allows carriers to average their accuracy results across wide areas. Large carriers operating in urban areas thereby are able to meet the accuracy requirements on average, even though their rural areas do not comply. RCC does not operate in large, urban areas, and therefore does not share in any averaging benefits experienced by larger carriers. Kohler reb. pf. at 30-31.
- 33. RCC is currently working with Polaris Wireless to improve accuracy in its existing network. If the Polaris solution does not work, RCC may seek a waiver of the accuracy standards from the FCC. RCC has not yet sought a waiver from the FCC. Kohler reb. pf. at 31-32; Meredith pf. at 14.
- 34. RCC has been working with the Vermont E-911 Board since 1996 regarding RCC's E-911 deployment. Kohler reb. pf. at 31-32.

- 35. RCC has an incentive to deploy E-911 as quickly as it can because it is required to do so and also because location-based technologies can add value for consumers and carriers both. Kohler reb. pf. at 33.
- 36. If RCC is granted ETC status and gains access to high cost support, RCC will be able to deploy additional infrastructure, including cell sites, that will not only increase RCC's coverage of emergency services generally, it will improve its ability to meet its federal E-911 obligations. Kohler pf. rebuttal at 33; Lackey pf. rebuttal at 4.

# Discussion

"Access to emergency services" includes, at minimum, access to E911.<sup>44</sup> Because Vermont has requested RCC to provide E-911, RCC must also provide access to E-911 services. "Enhanced 911" is defined in the FCC's universal service rules as:

911 service that includes the ability to provide automatic numbering information (ANI), which enables the PSAP to call back if the call is disconnected, and automatic location information (ALI), which permits emergency service providers to identify the geographic location of the calling party. "Access to emergency services" includes access to 911 and enhanced 911 services to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems.<sup>45</sup>

The FCC has also imposed accuracy requirements on the ALI information provided by wireless carriers. In Phase I of the FCC's E-911 implementation schedule, RCC was required to deliver locational information to a public safety answering point. The location reported, however, was that of the antenna, not the calling customer. The FCC established "Phase II" requirements that require reporting of the location of the customer. The accuracy of that reporting was phased in. The accuracy standards themselves are complex and depend on the technology chosen by the carrier. Because RCC has selected a "network-based technology," the FCC accuracy standard requires RCC to deliver locational information that is within 100 meters of the customer's location for 67 percent of the time and within 300 meters of the caller's location

<sup>44. &</sup>quot;911" is defined as a "service that permits a telecommunications user, by dialing the three-digit code "911," to call emergency services through a Public Service Access Point ("PSAP") operated by the local government."

<sup>45. 47</sup> C.F.R. § 54.101(a)(5).

<sup>46. 47</sup> C.F.R. § 20.18(d).

for 95 percent of the time.<sup>47</sup> In what might be called "Phase II-A," RCC was required to meet specific accuracy standards for 50 percent of its locations or customers. On March 1, 2004, in what might be called "Phase II-B," the FCC extended those same accuracy standards to 100 percent of RCC's locations or customers.

RCC does provide locational information for customers. This allows E-911 to function. But RCC has failed to meet the FCC's accuracy requirements for Phase II-B. The ITCs contend that RCC should not be designated because it does not meet the FCC's current locational accuracy standards, although the ITCs do not cite any precedent for denying ETC status on this ground; i.e., for demonstrating that denial of ETC status is the "remedy" for that.

For two reasons, we conclude that meeting the FCC's current accuracy requirement for E-911 is not a necessary part of the "access to emergency services" requirement for ETC designation. First, no accuracy requirement, Phase II-B or otherwise, is explicitly referenced in the FCC's universal service regulations. While the ITCs dispute the accuracy of the information provided by RCC, they do not dispute that RCC does in fact provide the ANI and ALI information cited in the FCC's universal service rule. We conclude that providing such information is enough for ETC designation. If RCC has failed to meet the FCC's specific requirements for the accuracy of that information, the FCC has other enforcement remedies available.

If direct application of the accuracy standard is not mandatory, the question then is whether one should apply it in a discriminating basis, we think not. We are reluctant to import the FCC's Phase II-B locational accuracy standards here because they appear biased against companies, like RCC, that serve predominantly rural areas. As noted above, the accuracy standards apply to 100 percent of RCC's locations, but the accuracy standards themselves are further defined as probabilities. Also, averaging is allowed. The effect seems to be that a carrier can be "100 percent compliant" with Phase II-B standards even if up to 33% of its E-911 calls cannot be located within 100 meters and if up to 5% of the calls cannot be located within 300

<sup>47. 47</sup> C.F.R. § 20.18(h).

meters.<sup>48</sup> RCC asserts, and we accept, that this standard can more easily be achieved using a network-based technology in an urban area with a high number of cell sites per square mile. Therefore, carriers that serve both urban and rural areas would be advantaged by the FCC standards. If so, importing the FCC's Phase II-B standards into ETC cases could raise an insurmountable permanent barrier to the designation in Vermont of any predominantly rural wireless carrier that uses network-based technology. Technology-selection (or preclusion) by governmental preference is not an attractive policy.

The ITCs argue that the FCC rules in 47 C.F.R. Part 20 relating to E-911 accuracy should be read *in pari materia* with the FCC rules in 47 C.F.R. Part 54 relating to universal service because they both relate to Enhanced 911.<sup>49</sup> While we agree with this general rule of construction, the ITCs ask us to apply it in an unusually broad context. Rather then try to understand one word or phrase in a context found elsewhere, the ITCs ask us to deny relief to RCC under one part of FCC rules adopted by the FCC's Wireline Competition Bureau due to RCC's failure under another part of FCC rules adopted by the FCC's Wireless

Telecommunications Bureau. We do not believe that the principle of reading documents as a unified whole require us to go so far. The FCC rules are long and complex. Without more direct proof, we are reluctant to impute an intent to the FCC that a violation in one area disqualifies a company from relief in another area.

Second, we conclude that meeting the FCC's current accuracy requirement for E-911 cannot be a prerequisite for designation because any such policy would create a barrier to entry. RCC's only choice is to increase the number of cell sites so that network "triangulation" can be more accurate. As seen below, however, increasing the number of cell sites is the principal expected benefit of *granting* ETC certification. In other words, the ITCs contend that RCC cannot have money to build towers because RCC doesn't yet have enough towers.<sup>50</sup> The Board will not impose such a "Catch-22" on RCC. It is said that "the best is often the enemy of the good." In this case the independents invite us, in the name of perfect accuracy, to reduce the pace

<sup>48. 47</sup> C.F.R. § 20.18(h).

<sup>49.</sup> ITC Supplemental Reply Brief of 9/20/04 at 3.

<sup>50.</sup> The DPS recognized this contradiction as well. See Lackey reb. pf. at 4.

of more incremental improvements. We decline to do so.

In Docket 5918 the Board was also concerned with the effect of imposing excessive burdens as a prerequisite to designation. In that case the Board imposed significant conditions on the ETC designation, but it held that a carrier cannot be required to demonstrate universal signal coverage prior to receiving an ETC designation.<sup>51</sup> The complaint in both cases is insufficient cell towers. There we concluded that the absence of a signal in some areas, a "hole" in coverage, could not be a barrier to designation. Of course, in those areas without signal, a customer cannot receive any of the nine required services. Here, the problem is that while signal is available – and all the other nine services are available – E-911 is not of sufficient quality to allow accurate triangulation.

The difference is only superficial. We conclude that denying ETC designation for lack of sufficient towers to triangulate 911 callers would create the same kind of barrier to entry that we eschewed in Docket 5918, and with even less justification.

The FCC has adopted a similar standard. It has held that a company may be designated once it has shown a "capability and commitment to provide the nine supported services,"<sup>52</sup> and it is not necessary that the services actually be provided everywhere in advance. We are generally in agreement with this standard. While something more than a vague promise is needed from an applicant, something less than a deployed ubiquitous network will do.<sup>53</sup>

Vermont has made a major commitment to providing high quality E-911 services throughout the state. However, E-911 is not the state's *only* important telecommunications goal, and withholding designation here might convey a message that the Board places E-911 accuracy before other equally worthy goals. Expanding wireless coverage, for example, not only provides non-emergency services, but it provides basic 911 service in new areas. On the present record, therefore, we do not wish to suggest that the next cell sites built in Vermont necessarily should

<sup>51.</sup> Docket 5918, Order of 11/14/03 at 33; see also, South Dakota Preemption Order, note 24 above (requiring a carrier to provide all nine supported services throughout a service area prior to receiving ETC designation would have the effect of prohibiting prospective entrants from providing telecommunications services).

<sup>52.</sup> See Virginia Cellular, note 23 above, at 19 FCC Rcd 1563.

<sup>53.</sup> RCC here has plausibly asserted the "capability and commitment" mentioned in the FCC orders. See Kohler reb. pf. at 30-33; tr. 8/2/04 at 239 (Wood).

be devoted primarily to improving the E-911 locational accuracy.

The Hearing Officer concluded that RCC met the emergency services requirement. The ITCs asserted that the Hearing Officer effectively placed the burden of proof on the ITCs, not RCC. We agree that RCC could have offered more detailed proof about its E-911 locational accuracy. However, RCC has met its minimum burden of proof here. It has shown that it provides the "ALI" locational data required to make E-911 function and that it has deployed equipment to improve the accuracy of the customer location information that is provided to PSAPs. That is sufficient proof to conclude that RCC has satisfied the FCC's universal service rules regarding access to emergency services.

The ITCs correctly note that RCC has not filed any data in this proceeding to enable the Board to make a determination of the extent of RCC's E-911 accuracy in Vermont. The Department recommends that, as a condition of ETC designation in this proceeding, the Board require RCC to report on its progress toward, and outlook for, fully implementing Phase II E-911 capabilities in Vermont as part of the company's annual certification process. We concur.

RCC's plan to resolve the FCC compliance issue is somewhat vague. RCC has only said that it is working with a vendor and "may" seek a waiver of the accuracy standards.<sup>54</sup> RCC is in nominal violation of the FCC rules, and it should clarify this situation. RCC shall seek an FCC waiver no later than September 1, 2005, if it is not yet otherwise in compliance with FCC rules by that date.<sup>55</sup>

In conclusion, RCC has demonstrated its ability and commitment to offer access to emergency services in the service area for which it seeks designation and that designation will, in fact, assist the company in meeting those obligations.

<sup>54.</sup> Kohler reb. pf. at 32.

<sup>55.</sup> We also conclude below that RCC should be designated until December 31, 2005. At that time, the Board can review RCC's progress on clarifying the applicability of FCC accuracy standards.

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# F. Access to Operator Services

## **Findings**

37. RCC provides customer access to operator services; customers reach operator services in the traditional manner by dialing "0." Supporting Memo at 6; Lackey pf. at 9.

## Discussion

"Access to operator services" is defined as "access to any automatic or live assistance to a consumer to arrange for billing or completion, or both, of a telephone call." 47 C.F.R. § 54.101(a)(6). It is undisputed that RCC satisfies this requirement.

# G. Access to Interexchange Services

## **Findings**

38. RCC provides access to interexchange services through interconnection agreements with interexchange carriers. Customers may also "dial around" to reach their interexchange carrier of choice. Supporting Memo at 6; Lackey pf. at 9-10.

#### Discussion

"Access to interexchange service" is defined as the "use of the loop, as well as that portion of the switch that is paid for by the end user, or the functional equivalent of these network elements in the case of a wireless carrier, necessary to access an interexchange carrier's network." 56

RCC provides access to interexchange services through interconnection agreements with interexchange carriers. These arrangements enable RCC to provide its customers access to interexchange services. RCC customers may also "dial around" to reach a different interexchange carrier.

The ITCs ask the Board to require "equal access" as a prerequisite to ETC designation.<sup>57</sup> In other words, the ITCs would have the Board require RCC to allow its customers to presubscribe to other interexchange carriers.

<sup>56. 47</sup> C.F.R. § 54.101(a)(7).

<sup>57.</sup> Nishi pf. at 17.

The Board is preempted from using state authority to mandate that wireless carriers provide equal access.<sup>58</sup> Moreover, while states may force wireless providers to meet requirements related to universal service, they may not regulate rates or entry. The FCC has also held that states may not use ETC proceedings to require a wireless provider to provide equal access.<sup>59</sup>

By providing "dial around" access to interexchange carriers, RCC meets the explicit terms of the FCC's rule. The FCC recently considered adding equal access to the list of nine supported services, a decision that would have made equal access an explicit requirement of ETC certification. In a "Definitions Order" issued in July of 2003, the FCC decided to "make no decision" at that time. <sup>60</sup> Decision or not, the effect was to leave equal access off the list of minimum services required for ETC certification. Therefore the Public Service Board is not obligated to require equal access as a condition of ETC certification.

Nevertheless, the Board might want to give notice here that it may impose equal access obligations in one relatively narrow future scenario. The case concerns a future where multiple ETCs serve a local exchange market and an incumbent LEC seeks to "relinquish" its ETC designation in that market. The Joint Board recommends in that case imposing equal access on the remaining ETCs.<sup>61</sup>

The Joint Board's recommendation addresses a significant issue. Most incumbent LECs are required to provide equal access. Therefore, in the hypothetical circumstance above, departure of the incumbent LEC could deprive all customers in an area of "1-plus" equal access to interexchange carriers. The Joint Board would address this problem with notice. Essentially

<sup>58. 47</sup> U.S.C. § 332(c)(8).

<sup>59.</sup> Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service, WT Docket No. 00-239, Memorandum Opinion and Order, FCC 02-164, paras. 6, 30 (rel. August 2, 2002).

<sup>60.</sup> See Federal-State Joint Board on Universal Service, Order and Order on Reconsideration, CC Docket No. 96-45, 18 FCC Rcd 15090, 15104, para. 33 (2003) (Definitions Order). The Joint Board previously had been unable to reach agreement on whether equal access should be added to the list of supported services and made no recommendation regarding this service. *Id.*, para. 1.

<sup>61.</sup> Federal State Joint Board on Universal Service, CC Docket No. 96-45, Recommended Decision, FCC 04J-1, rel. 2/27/04, para. 28. The FCC has not yet acted on this Joint Board recommendation.

the Joint Board recommends that the Board here should announce that it might impose equal access obligations in such a future proceeding.

We decline to take that step because it would not increase the Board's future authority in any meaningful way. If an incumbent LEC were to seek to withdraw from the Vermont market, as hypothesized, its customers would face a variety of problems. Very likely the most daunting would be finding a way to obtain replacement service from a wireless ETC for all or nearly all of a departing wireline carrier's customers.<sup>62</sup> Perhaps for this reason, federal law gives state commissions the *duty* to ensure continued service. The Board "shall require the remaining eligible telecommunications carrier or carriers to ensure that *all customers* served by the relinquishing carrier *will continue to be served*."<sup>63</sup> This phrase affirms (and possibly augments) state authority over the minimum duties or all remaining carriers of last resort. Essential to this task will be to construe the statutory phrase "continue to be served." The Board might thereupon conclude that continuation of service implies continuation of all essential features of wireline service, including equal access.

In summary, adding an explicit condition here, as recommended by the Joint Board, would only claim a right in a future proceeding that already appears to have been created by statute. We defer decisions on how ETC relinquishment proceedings should be decided until such a case is actually filed.

RCC provides access to interexchange services consistent with the requirements for ETC designation, and no condition is required relating to equal access.

#### H. Access to Directory Assistance

#### **Findings**

39. RCC provides directory assistance to customers who dial "411" or "555-1212." Supporting Memo at 6; Lackey pf. at 10.

<sup>62.</sup> The problems may be exacerbated by RCC's plan to rely, in part, on resale as a means of offering service. See finding 52 below. If the underlying wireline carrier seeks to abandon its plant, resale will become impossible.

<sup>63. 47</sup> U.S.C. § 214(e)(4) (italics added). The Board also must "require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier." *Id*.

#### Discussion

"Access to directory assistance" is defined as "access to a service that includes, but is not limited to, making available to customers, upon request, information contained in directory listings."<sup>64</sup> It is undisputed that RCC satisfies this requirement.

# I. Toll Limitation for Qualifying Low-Income Customers

# **Findings**

40. RCC provides toll limitation by utilizing its toll-blocking capabilities for Lifeline customers upon designation as an ETC. Supporting Memo at 7; Lackey pf. at 10.

#### Discussion

"Toll blocking" is a service provided by carriers that allows customers to elect not to allow the completion of outgoing toll calls.<sup>65</sup> "Toll control" is a more complex service that would allow a customer to specify a certain amount of toll usage that may be incurred on their telecommunications channel per month or per billing cycle.<sup>66</sup>

An ETC can comply with federal requirements by providing toll blocking, so long as it remains incapable of also providing toll control.<sup>67</sup> It is undisputed that RCC satisfies this requirement by providing toll blocking.

## VII. LIFELINE AND LINK-UP

# **Findings**

41. In Docket 5918, RCC was designated as an ETC in Vermont's non-rural service territory. The Department and RCC reached agreement in that docket concerning implementation of the Lifeline and Link-Up programs. The approach developed in that docket was approved by the Board and has subsequently been implemented by RCC. If ETC

<sup>64. 47</sup> C.F.R. § 54.101(a)(8).

<sup>65. 47</sup> C.F.R. § 54.400(b).

<sup>66. 47</sup> C.F.R. § 54.400(c).

<sup>67. 47</sup> C.F.R. §§ 54.101(a)(9) and 54.400(d). An ETC that is capable of providing both services must provide both. 47 C.F.R. § 54.400(d).

designation is granted in the territory of the independent telephone companies, RCC has committed to offer Lifeline and Link-Up uniformly throughout its Vermont service territory under the terms agreed to and ordered in Docket 5918. Supporting Memo at 7; Frankel pf. at 4-6; tr. 8/3/04 at 78 (Frankel).

- 42. RCC has 85 customers currently participating in the Lifeline program. Frankel pf. at 4.
- 43. As an ETC, RCC is subject to the same advertising requirement that the Board has imposed on other carriers annually in the Vermont Universal Service Fund ("VUSF") rate-setting docket. All such carriers are required to stuff their bills annually in January or February with information about Lifeline availability and how eligible customers may apply for Lifeline. Frankel pf. at 5.
- 44. RCC is making additional efforts to promote Lifeline and Link-Up. Since RCC was first designated an ETC in Vermont's non-rural territory, RCC has added advertisements of Lifeline and Link-Up in retail locations, agent locations, newspaper advertisement and its website; display posters in stores; and a page for Lifeline and Link-Up on the Unicel website. Frankel pf. at 5.
- 45. RCC's promotion of Lifeline and Link-Up generally exceeds that done by Vermont's incumbent local exchange carriers. Frankel pf. at 4-5.
- 46. RCC has committed to advertise the availability of Lifeline and Link-up benefits throughout the proposed service area by including mention of such benefits in advertising and by reaching out to community health, welfare and employment offices. Supporting Memo at 7; Frankel pf. at 4-6.
- 47. RCC does not offer toll control because toll control is not commercially available. RCC provides toll blocking for Lifeline Customers. Lackey pf. at 10.
- 48. RCC has become a full participant in the Lifeline Coordinating Committee, the interagency group that addresses issues related to Lifeline implementation. Frankel pf. at 4.

#### Discussion

FCC rules require ETCs to offer Lifeline and Link-Up to their customers and to advertise

the availability of the two programs.<sup>68</sup> The evidence of record supports a conclusion that RCC offers Lifeline and Link-Up to qualifying customers and advertises their availability in accordance with FCC requirements.

The Department has recommended that RCC be required, as a condition of its designation, to fulfill its commitments with respect to Lifeline and Link-Up provision and promotion. We concur.

## VIII. OFFERING SERVICES THROUGHOUT THE SERVICE AREA

### **Findings**

- 49. RCC's signal coverage does not reach significant portions of the geographic territory served by the ITCs. Lackey pf. at 11-12.
- 50. RCC has committed to expanding its coverage by constructing facilities in response to demand and specific customer requests, and it will attempt to serve all customers with its own facilities. RCC does not anticipate constructing plant to serve areas where there is no demand for service. Kohler pf. rebuttal at 9.
- 51. Docket 5918 requires RCC to respond to reasonable requests for service by providing service to a customer who has a billing address in the service area, at the customer's billing address or at a different address specified by the customer that represents the customer's home or work location. RCC recommitted to that condition in this proceeding. Docket 5918 Order of 11/14/03 at 34, 38-39, 51; Supporting Memo at 4, 21; Kohler reb. pf. at 9, 22; Frankel pf. at 11.
- 52. Upon designation, RCC will offer service throughout its ETC service area to all consumers, upon "reasonable request," using either its facilities or a combination of facilities and resale. Whether a request for service is reasonable can be determined, in some cases, only after investigation and an attempt to apply lesser means of supplying service. Pet. at 3; Kohler pf. at 3; Supporting Memo at 4-7; Kohler reb. pf. at 9; tr. 8/2/04 at 44-45 (Kohler).
- 53. If standard equipment has not worked at a customer's residence or place of business, RCC does not currently have an explicit policy and practice of advising customers that they may

<sup>68. 47</sup> C.F.R. §§ 54.405, 54.411; Frankel pf. at 4.

seek an escalation process or otherwise make a "reasonable request for service" beyond standard equipment. Tr. 8/2/04 at 55-58 (Kohler).

- 54. When a customer makes a reasonable request for service, RCC begins by offering a new customer the use of a standard handset that is purchased by the customer. During a thirty-day trial period the customer may return the handset for a full refund. If the customer wishes to pursue service further, RCC makes available a variety of options, including external fixed antennas (including a large "yagi" antenna), more powerful telephones, hands-free car kits, "cell extenders" and digital boosters; all of these are obtained at the customer's added expense. RCC also considers adjusting its existing antennas, adding in-building "repeaters" to improve service, constructing new cell sites, and offering resale of wireline service as possible ways of complying with a reasonable request for service. Expansion of RCC's network is a last resort. Supporting Memo at 5; Kohler reb. pf. at 22; tr. 8/2/04 at 41-52 (Kohler).
- 55. RCC may consider a request for service unreasonable if providing service would require an expansion of RCC's network. An "unreasonable" request for service would include the case in which service to a single customer could be obtained only by constructing an additional cell site. The typical cost of such a cell site is approximately \$250,000.00. Tr. 8/2/04 at 42-45 (Kohler).
- 56. Disputes concerning RCC's individual decisions on whether requests were reasonable and how RCC responded may be reviewed by the Board on a case-by-case basis and generally in annual certification or redesignation proceedings. Tr. 8/2/04 at 42-44 (Kohler), 148, 181 (Lackey).
- 57. RCC apparently has no current practice or firm plans to advertise to potential customers that they may make a "reasonable request for service" that might obligate RCC to provide additional facilities to serve the customer. The record is unclear about how helpful the RCC sales force actually is at explaining that a potential customer who cannot obtain satisfactory service using standard equipment has other options available. Tr. 8/2/04 at 55-58 (Kohler).
- 58. If designated, RCC will receive support for all of its customers in high-cost areas, even those who bore the expense of this additional equipment. Tr. 8/2/04 at 49, 53 (Kohler).
- 59. The Department does not currently require that RCC track or report its responses to reasonable requests for service. Tr. 8/3/04 at 81-2 (Frankel).

- 60. Incumbent LECs today serve a very high percentage of the fixed-location residences and businesses within their territories, their facilities are actually limited to a small portion of the franchised area, and they impose significant charges for long new line extensions. Tr. 8/2/04 at 31 (Kohler); tr. 8/2/04 at 224-47 (Wood).
- 61. The ITCs presently are required to file tariffs describing how the filing carrier handles requests for service. Tr. 8/3/04 at 122 (Nishi).
- 62. Vermont's E-911 location data layer includes the geographic coordinates of each household or commercial address, and while it is not a perfect match to locations that have or may request phone service, it should correlate to a high degree. Lackey pf. at 14-15.
- 63. RCC can compile and periodically update an analysis of the extent of its geographic coverage using GIS analytic software to overlay RCC's detailed coverage maps on the E-911 location data layer. Using this approach, RCC could calculate the percentage of E-911 addresses, by exchange or study area, to which it is capable of providing service. Changes from year to year would serve as an objective indicator of RCC's progress toward universal coverage. Lackey pf. at 14-15.
- 64. RCC has committed to provide detailed coverage maps in connection with recertification proceedings. Kohler reb. pf. at 28.

## Discussion

The nine services must be "offered" throughout the service area for which the designation is received.<sup>69</sup> This can be accomplished using the ETC's own facilities or a combination of its own facilities and resale of another carrier's services.<sup>70</sup> The issue is whether RCC "offers" its services sufficiently widely to be eligible for certification as an ETC.

The Board has repeatedly expressed its concern about the limited scope of wireless signal coverage in Vermont. Expanding that coverage to Vermont's more remote and rural areas is an important policy objective of this state.

Ultimately a wireless company cannot be said to "offer" universal service to a customer if

<sup>69. 47</sup> U.S.C. § 214(e)(1)(A); 47 C.F.R. §54.201(d).

<sup>70.</sup> Id.

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the customer cannot receive a signal from that company. If the term "offer" is to have any meaning, there must be some expectation that the carrier actually can provide the service if the customer requests it.<sup>71</sup>

RCC argues that it is not required to provide ubiquitous coverage without compensation, any more than wireline carriers are so required. It is true that wireline carriers often impose significant charges to extend service. While the current scope of RCC's signal coverage is quite limited, RCC seeks designation on the promise that, beginning immediately, it will respond to all future "reasonable requests for service," even if there is not yet signal coverage at the customer's billing address or other home or work location specified by the customer. RCC contends that it will respond by offering a variety of measures, including external antenna kits, "cell extenders" or more powerful telephones, adjusting RCC's existing antennas, and constructing new infrastructure. RCC has committed to expend all high cost support received in an appropriate manner. We expect that RCC will spend a significant proportion of such support to expand coverage. Thus, we shall require RCC to report its receipt and use of the funding to the Board on an annual basis so the Board can determine whether RCC is meeting its obligations. We expect the first such report, in writing, on or before September 1, 2005, and yearly thereafter.

In a recent ETC decision, the FCC described similar commitments, and found them sufficient.

In instances where a request is made by a potential customer within [the competitive ETC applicant's] licensed service area but outside its existing network coverage, it will take a number of steps to provide service that include determining whether: (1) the requesting customer's equipment can be modified or replaced to provide service; (2) a roof-mounted antenna or other equipment can be deployed to provide service; (3) adjustments can be made to the nearest cell tower to provide service; (4) there are any other adjustments that can be made to network or customer facilities to provide service; (5) it can offer resold services from another carrier's facilities to provide service; and, (6) an additional cell site, cell extender, or repeater can be employed or can be constructed to provide service.<sup>72</sup>

<sup>71.</sup> Docket 5918, Orderof 6/26/03 at 34.

<sup>72.</sup> Virginia Cellular, para. 15. Virginia Cellular also promised to construct several additional cell sites in sparsely populated areas. Id., para. 16.

RCC envisions a hierarchy of escalating steps to provide service. Customer-paid enhancements (e.g., higher-powered telephones and better antennas) would come first. If that fails, then come relatively low-cost options for RCC, such as antenna adjustments. Finally, there is the most expensive option, adding a cell site. In the end, a customer may be told that his or her request for service is "unreasonable" because it requires RCC to spend too much money.

The key to RCC's success in serving all of Vermont will be how it implements this commitment to respond to all "reasonable" requests. It is probably more accurate to say that RCC is promising to make a "reasonable response" to any request. We agree with the DPS and RCC that the concept will need to be defined in some measure on a case-by-case basis. Unfortunately, it is impossible to determine beforehand when RCC's responses are reasonable. This increases the importance of clear procedures and adequate staff training. Without them, RCC's commitment could be deprived of much of its value to the public. Therefore, some conditions are needed to ensure that RCC responds sensibly to customer requests for further measures to obtain an adequate signal quality at the customer's billing address or at a different address specified by the customer that represents the customer's home or work location. These conditions are discussed below in part XIII.

So long as appropriate conditions are attached, RCC "offers" the nine services throughout the proposed service area. Therefore, RCC has demonstrated its ability and commitment to offer access to the public switched network throughout its proposed service area.

#### IX. ADVERTISING

#### **Findings**

- 65. RCC has an extensive advertising campaign in multiple daily, weekly and monthly print publications, more than two dozen radio stations, four television stations and Adelphia Cable, and other advertising. RCC is a competitive carrier, and its level of advertising generally exceeds that which is typical of the ITCs. Frankel pf. at 3-4.
- 66. RCC has committed to advertise the availability of each of the supported services throughout its licensed service area using media of general distribution through methods that may include newspaper, magazine, direct mailings, public exhibits and displays, bill inserts and

telephone-directory advertising. Supporting Memo at 7.

67. RCC has also committed to advertising the availability of Lifeline and Link-Up benefits throughout its service area by including mention of the benefits in its advertising and through reaching out to community health, welfare and employment offices to provide information to those most likely to qualify for these benefits. Supporting Memo at 7.

#### Discussion

FCC rules condition ETC designation on the carrier advertising the availability of the nine services required for designation.<sup>73</sup> It is undisputed that RCC satisfies this requirement.

The Department has recommended that RCC be required, as a condition of its designation, to fulfill its commitments with respect to advertising the availability of the nine checklist services.<sup>74</sup> We concur generally, but think that advertising can be tailored to more effectively benefit consumers.

As recommended by the Department, RCC would be obligated to advertise the availability of the nine services required for designation. While advertising by RCC could benefit the public, in this configuration, we anticipate little benefit from advertising that describes the elements in the FCC's rules. There is particularly little value in advertising items, like tone dialing or connection to the interexchange network, that they are so common they are simply assumed by most customers. There is also no apparent benefit from advertising items, like local usage, that, as seen above, has little meaning in the cellular environment.

Of greater use to the public would be advertising aimed to demonstrate to the public that RCC, as an ETC, has an obligation to make efforts to provide service in areas where customers cannot easily obtain it. In other words, it might benefit the public to learn that RCC is willing to make extra efforts to provide service in rural areas. Therefore, RCC will be required, as a condition of its designation, to advertise the commitments it has made with regard to extending service or otherwise enhancing the customer's ability to receive a signal in areas with weak or nonexistent coverage. RCC will be required to file a plan for such advertising within 60 days of

<sup>73. 47</sup> C.F.R. § 54.201; Frankel pf. at 3.

<sup>74.</sup> Frankel pf. at 4.

designation.

#### X. PUBLIC INTEREST

This petition would affect the service areas of nine rural telephone companies. When one or more such areas are affected, the third sentence of § 214(e)(2) imposes an affirmative obligation for factual findings regarding the public interest. The public interest test requires a balancing of benefits and costs, and is a fact-specific exercise. For example, in its *Virginia Cellular* decision, decided under a parallel statute, the FCC considered the benefits of increased competitive choice, the impact the designation might have on the universal service fund, the unique advantages and disadvantages of the competitor's service offerings, any commitments made regarding quality of telephone service, and the competitive ETC's ability to satisfy its obligation to serve the designated area within a reasonable time frame.<sup>75</sup>

The following sections consider a number of potential benefits and costs from ETC designation, each of which may affect the public interest.

# A. Expanding RCC's Network

#### **Findings**

- 68. If RCC is designated in this docket, RCC will receive approximately \$6.3 million in federal universal service support each year for its Vermont operations. This includes \$2.3 million resulting from Docket 5918 in which RCC was designated for non-rural service areas. It also includes an incremental \$4.0 million for rural service areas considered in this docket. Supporting Memo at 12; tr. 8/2/04 at 10 (Kohler).
- 69. RCC recognizes an obligation to demonstrate that every dollar of Federal support is invested to construct, maintain, and upgrade RCC's facilities and services in a way that benefits consumers in Vermont's rural service areas and to certify to the Board annually (and subject to Board review) that it has done so. RCC Brief at 20; Kohler reb. pf. at 8.
  - 70. Access to high cost support will allow RCC to accelerate expansion of its coverage to

<sup>75.</sup> Virginia Cellular, para. 28; see also, RCC Brief at 14.

areas of the state without sufficient coverage by allowing it to increase its capital investment. RCC has committed to use all Federal support received in accordance with federal regulations and to "expand coverage area [sic] in the ETC Service Area." Supporting Memo at 12-13; see Kohler reb. pf. at 8, 10-11, 28; Lackey pf. at 11-12, 15.

- 71. RCC has agreed to report its use of federal support and capital-construction spending annually and to provide detailed coverage maps in connection with its recertification proceedings. Supporting Memo at 14-15, 23; Kohler reb. pf. at 2-3, 11, 28.
- 72. RCC has submitted specific planned investments for calendar year 2004, but it has not finalized construction plans for 2005 or beyond. RCC expects to make these decisions based on a variety of factors, such as service requests and siting and permitting constraints. RCC is unable to project exactly where wireless facilities will be added after 2005, in part, due to uncertainty about permits. Supporting Memo at 12; Kohler pf. at 12; Kohler pf. rebuttal at 8; Lackey pf. at 13-14; tr. 8/2/04 at 71-2 (Kohler).
- 73. RCC's construction plan for 2004 includes numerous projects unrelated to expanding signal coverage in Vermont. These include numerous GSM upgrades and seven projects at locations outside Vermont. Exh. ITC-14.
- 74. RCC has committed in the first year following designation to build wireless facilities, including cell sites, in Wallingford/Danby, Charlotte, Marshfield/Cabot and Franklin/Highgate, provided that it receives sufficient support and appropriate land-use and other environmental approvals. Supporting Memo at 12, 21; tr. 8/2/04 at 131-34 (Kohler); see id. at 134 (counsel's rep.); see also Lackey pf. at 13-14.
- 75. The mobility of RCC's services provides a significant benefit to consumers, especially those living in rural areas who must often travel long distances. Many areas where people travel, hike, camp, fish or work outdoors have no telephone service. The mobile service also facilitates emergency services that can help mitigate one of the risks of living in isolated, rural areas. Supporting Memo at 12, 15; tr. 8/2/04 at 228 (Wood).
- 76. RCC's customers also benefit from wider local-calling areas, advanced features available through RCC's network and handsets, advanced messaging services, as well as favorable long distance calling prices and packages with multiple capabilities, including mobility, several

customer calling features. RCC is currently deploying GSM-based high-speed data services. Kohler reb. pf. at 17; Lackey reb. pf. at 9-10.

- 77. RCC is in the process of converting its network to GSM, a third-generation technology, which it hopes to complete by the end of 2004 or beginning of 2005. Approximately 46 of RCC's 65 cell sites have been upgraded to support GSM, in addition to the existing analog and TDMA platforms. The new GSM platform will support a data component that will allow RCC to offer data applications that include around 115 kilobits per second ("kbps"). A subsequent technology upgrade is expected to boost speeds to around 500 kbps. Kohler reb. pf. at 13-14, 20; tr. 8/2/04 at 127-129, 133 (Kohler).
- 78. Wireless technology offers the hearing-impaired community a variety of services, including text messaging, e-mail, web and TTY access via wireless phone. These forms of communications via cellular technology are especially valuable for deaf and hearing-impaired individuals because wireless equipment is portable. Nothwithstanding the current limitations on hearing-aid compatibility for digital service, deaf and hard-of-hearing individuals currently benefit from wireless-service features including text messaging, email, web and TTY access via a wireless phone. Frankel reb. pf. at 4-5.
- 79. Designation of RCC and the associated Lifeline and Link-up benefits will benefit low-income consumers that otherwise would not have the opportunity to obtain discounted, mobile-telephone service. Kohler reb. pf. at 18.
- 80. Expanded signal coverage can have significant benefits during emergencies. During the 1998 ice storm and its resultant extended power and landline-telephone-service outages, "... RCC kept a majority of its cell sites and its switch operational, serv[ing] as the primary line of communications for public-safety personnel." RCC also donated numerous cell phones to the National Guard, Red Cross and State Police to ensure that these organizations maintained communications. RCC has developed a disaster-recovery plan and has placed wireless-telecommunications field kits at locations around the state, each containing five wireless phones activated, fully charged and available for use by emergency personnel. Supporting Memo at 11-12, 22; Kohler reb. pf. at 15-16.
  - 81. Increased cell site deployment, and the associated improvements in signal coverage, will

improve the accuracy of E-911 locational activities. Kohler reb. pf. at 14-15; Lackey reb. pf. at 4; tr. 8/2/04 at 158-59 (Lackey); tr. 8/3/04 at 20 (Wood).

82. To maintain the continuity of its service in the event its main power supply goes down, RCC provides most cell sites with battery backup that provides between two to three hours of power. RCC also equips hub cell sites or remote cell sites with additional power backup from a propane or diesel generator, which extends the power backup to at least 12 hours. RCC maintains a large diesel generator at its switch location in Colchester, Vermont, that will provide up to two days of extended power backup before requiring refueling. Supporting Memo at 22.

#### Discussion

Designation will increase RCC's federal universal service revenues by \$4.0 million per year. This in turn will allow RCC more rapidly to extend its coverage into the rural service territories covered by this petition and generally throughout the state.<sup>76</sup> This prospect weighs heavily in favor of the public interest.

Some benefits of expanded wireless service are inherent in the technology. The most obvious benefit of network expansion is that it will allow some citizens who live or work in remote locations to obtain a first connection to the telephone network. Expanded RCC service would provide a great benefit to such customers. Even in areas already served by incumbent LECs, some customers will consider wireless a viable alternative to landline service. For these customers, RCC can provide a more valuable service than the incumbent provider.<sup>77</sup>

Mobility gives wireless communications some unique capabilities. In rural Vermont, many areas where people travel, hike, camp, fish or work outdoors have no landline service. Availability of wireless coverage in these areas will provide an important benefit to consumers, even if those consumers live and work elsewhere. Wireless service also has great value for reaching emergency services when, as happens frequently in rural areas, the customer finds himself or herself far from a landline phone. In addition, wireless provides benefits for deaf and

<sup>76.</sup> The average cost of a new cell site is \$250,000.00. See finding 53 above. If all the additional support were applied to new cell sites, that would produce approximately 16 new cell sites per year.

<sup>77.</sup> While the value to individual customers is high, this benefit will be limited to relatively few people, because customers in extremely remote areas may find it the hardest to make a "reasonable" request for service.

hearing impaired customers in the form of portable text services.

Marketing and regulatory decisions also give wireless services some advantages.<sup>78</sup> Wireless companies typically offer a wider range of service plans than those available from landline companies. Wireless plans typically also include a geographically larger local calling area than is characteristic of landline services. Designation will also allow low-income Vermonters to access the Lifeline program.

Still, other benefits can be expected from RCC's own technological and deployment decisions. RCC is upgrading its advanced data handling capabilities, and RCC is deploying high-speed data links using GSM technology. These technology upgrades will offer enhanced data handling capabilities and more reliable service. RCC also has expended significant capital so that it can remain functional in emergencies.

Expanding wireless service into all areas of rural Vermont is consistent with the goals of the Act, which seeks to ensure that consumers in rural, insular and high-cost areas:

have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and are available at rates that are reasonably comparable to rates charged for similar services in urban areas.<sup>79</sup>

Additional facilities deployment also furthers the Governor's objective of increasing wireless service coverage along Vermont's highways.<sup>80</sup>

RCC's construction planning for 2005 and beyond is not complete. RCC points out that detailed construction plans are not required by law.<sup>81</sup> They are, however, one means of demonstrating a commitment to serve, although such plans cannot anticipate customer demand and thus may not prove accurate. Moreover, construction depends upon support, which depends on line counts, and those are presently unknown.<sup>82</sup> The DPS agrees that detailed advance

<sup>78.</sup> Wireless has a different system for intercarrier compensation than wireline carriers, and it has a different functional definition of "local" calling.

<sup>79. 47</sup> U.S.C. § 254(b)(3).

<sup>80.</sup> Lackey pf. at 16.

<sup>81.</sup> Kohler reb. pf. at 9; see Wood reb. pf. at 41-45.

<sup>82.</sup> Wood reb. pf. at 42-45.

construction plans should not be required.83

On balance, RCC's designation will allow for a service expansion that will be of significant direct value to many Vermont consumers and to the state as a whole.<sup>84</sup> To ensure that federal funds translate into network expansion however, some conditions will be imposed on the designation. These are discussed in Section XIII, below.

# **B.** RCC's Service Quality Commitments

- 83. RCC has committed here to reduce call blockage, and accepts the same conditions on call blockage and coverage that it accepted in Docket No. 5918. RCC will use, as necessary, a portion of Federal support to reduce the frequency of blocked calls. RCC will file a quarterly report with the Board and the Department tracking its efforts to reduce call blockage and improve service overall. RCC also notifies its subscribers annually, and will continue to do so, that its services do not provide coverage in some areas of the state and that, in areas where coverage is available, call blockage may occur. Supporting Memo at 13-15, 23; Kohler reb. pf. at 2-3, 11, 18-19, 28. See Docket 5918 Order of 11/14/03 at 48-53.
- 84. RCC has committed here to comply with the Cellular Telecommunications and Internet Association Consumer Code for Wireless Service (the "CTIA Code"). Although it has not yet filed the paperwork to obtain a certification of compliance with the CTIA Code, RCC believes that it is in compliance with the CTIA Code. Tr. 8/2/04 at 59-61 (Kohler).
- 85. The Department does not monitor compliance with the CTIA code, which is a voluntary code. If it did monitor compliance, the Department would rely on a combination of RCC's self-reporting and information received through customer complaints. Tr. 8/3/04 at 79-80 (Frankel).
- 86. The CTIA Code provides that the wireless carriers should supply customers with a map of coverage. RCC offers a map to the public through its website, but the map lacks a zoom function that would allow customers to perceive coverage detail. The only map RCC currently

<sup>83.</sup> Tr. 8/2/03 at 178, 180 (Lackey).

<sup>84.</sup> How those funds will be used is considered below in part XIII.

provides to customers does not give customers any meaningful level of detail. RCC does currently have a map of its coverage in greater detail, but it does not provide this map to customers, nor does it post that map at retail sites. Tr. 8/2/04 at 59-63 (Kohler).

- 87. RCC has committed here to comply with the consumer-protection standards established by the Board in Docket No. 5903 (by its Order of 7/2/99), but with modifications to adopt the standards to wireless service. RCC worked with the Department to establish how the requirements of the Order in Docket 5903 must be altered to apply to a CMRS carrier, but RCC has not sought a waiver of portions of the rules it considers inappropriate to wireless. Tr. 8/2/04 at 75, 92-95 (Kohler).
- 88. RCC does not file the service quality reports required of local exchange carriers by Docket 5903. Those reports include "metrics" that arose from a stipulation between the incumbent phone companies and the Department. The Department does not expect RCC to file reports pursuant to Docket 5903. Tr. 8/3/04 at 72 (Frankel).
- 89. When the DPS negotiated the standards in Docket 5903, only wireline carriers participated in the negotiations over the reporting standards. Frankel reb. pf. at 6-7.
- 90. RCC has committed here to comply with the standards of Board Rules 3.200 and 3.300, with respect to the treatment of customer deposits and disconnections, with certain modifications to adopt the standards to a wireless carrier. Supporting Memo at 13-14, 22-23; Kohler reb. pf. at 18-19, 28; see Frankel pf. at 7-9; Frankel reb. pf. at 5-7.
- 91. RCC has committed to accept each of the preceding consumer-protection standards as conditions to its designation as an ETC in this docket. Kohler reb. pf. at 18-19, 28; Frankel pf. at 7-9.

#### Discussion

RCC has made numerous quality-related commitments here, some amounting to the renewal of promises made in Docket No. 5918. These commitments enhance the public benefit wherever RCC has a useable signal, and they weigh in favor of RCC's designation.

The Department recommends that these commitments become conditions of RCC's ETC

designation in order to provide significant incentive for the company to meet these obligations.<sup>85</sup> We agree.

RCC agrees to reduce call blockage, and it again accepts the conditions on call blockage and coverage that it accepted in Docket 5918. RCC also agrees to use a portion of Federal support to reduce the frequency of blocked calls. RCC agreed to file a report with the Board and the Department tracking its efforts to reduce call blockage and improve service overall. RCC also notifies its subscribers annually, and will continue to do so, that its services do not provide coverage in some areas of the state and that, in areas where coverage is available, call blockage may occur. We agree with all of these steps, except that a quarterly call blocking report is not necessary. With so many other things reported annually, this can also be reported annually.

In this docket, RCC makes a commitment to comply with the CTIA Code. It is noteworthy that RCC complied belatedly with a related requirement from Docket 5918. In the November, 2003 Order in that docket, the Board noted that the recently adopted CTIA Code requires that a wireless carrier make a coverage map available to persons seeking service.<sup>86</sup> Consistent with its earlier notice,<sup>87</sup> RCC asserts here that it is in compliance with that code.<sup>88</sup> Yet at the date of hearings, RCC did not offer an adequate coverage map (although it predicted that it would do so by the end of the week during which technical hearings were held).<sup>89</sup> RCC does not currently provide or post its map at its retail sites, although its web site does have maps.<sup>90</sup>

The Department and RCC agreed in Docket 5918 that RCC would be bound by Docket 5903. They assert here, however, that they had not expected or intended that RCC should be bound by what are known as the "service quality standards" portion of that Order, or their related reporting requirements. Rather, they assert that it was their intent that only the consumer

<sup>85.</sup> Lackey pf. at 17-18; Frankel pf. at 4, 6, 8,10-12.

<sup>86.</sup> See tr. 8/2/04 at 59 (Kohler).

<sup>87.</sup> Letter of Suzanne M. Monte to Clerk of the Board dated December 12, 2003. See RCC Comments of 9/10/04 at 2.

<sup>88.</sup> Tr. 8/2/04 at 17, 59 (Kohler).

<sup>89.</sup> Tr. 8/2/04 at 59 (Kohler).

<sup>90.</sup> Tr. 8/2/04 at 60 (Kohler).

protection standards would apply.

The ITCs argue that "RCC understood that it had agreed in Docket 5918 to comply with all the requirements of the Docket 5903 Order." They point to numerous instances where RCC has asserted that it complies with Docket 5903, or with the "service quality" requirements of Docket 5903.

It is not in dispute that RCC agreed to something in Docket 5918 that the parties at the time referred generally to that obligation as "service quality." What is in dispute is what those words mean. The disagreement may have semantic roots. In previous dockets, we have used "service quality" to describe both the broad subject of Docket 5903 (which includes consumer protections) as well as a narrower set of reporting requirements (that are independent of consumer protections). In short, as we have used the terms, "service quality" plus "consumer protection" equals "service quality."

The ITCs offer no direct testimony supporting their conclusion; instead they attempt to rely on admissions by RCC. The ITCs assert, for example, that "Ms. Kohler stated that RCC's obligation was subject to certain modifications for wireless carriers, but at no time did Ms. Kohler indicate that RCC did not anticipate being held to the Retail Service Quality Standards of Docket 5903." The ITC's Counsel examined witness Kohler in detail on this point. Ms. Kohler consistently answered that RCC had agreed to comply only "to the extent that it applies to wireless carriers." While some of Ms. Kohler's statements could support the ITC's position, the questions were broad and her answers largely nonresponsive. When read as a whole, the testimony suggests that although RCC believes it is in full compliance with Docket 5903, it has the right to modify those standards to reflect the differences between wireless and wireline service.

We have found nothing in the record that proves the ITCs' assertion. On the contrary, the record evidence supports RCC. As DPS witness Frankel testified, only wireline carriers participated in developing the reporting standards, and those standards still have not been

<sup>91.</sup> ITC Brief of 9/13/04 at 14.

<sup>92.</sup> ITC Reply Brief at 8.

<sup>93.</sup> Tr. 8/2/04 at 74:21, 75:7, 93:1, 93:16, 96:11.

evaluated for their applicability to the wireless context. The DPS did not consider that the retail service quality portion of the Docket 5903 Order would apply to wireless carriers.

There is no record evidence that RCC or any other wireless carrier ever undertook to comply with the wireline-based service quality standards in that Docket. Nor is there any record evidence that RCC or any other wireless carrier was ever challenged, before now, for failure to make "service quality" filings that wireline carriers routinely make.

The ITCs argue that the Board said "in three separate places that RCC should be subject to the "service-quality" or "retail service-quality" standards established in Docket 5903."94 The ITCs also quote language from Docket 5903 in which the Board stated that consumer protection standards are subsumed in service quality.<sup>95</sup> This confirms the semantic confusion, but does not clarify whether RCC was expected to file periodic reports.

Later, in the Docket 5918 Order, the hearing officer said, "[p]ursuant to the Amended Stipulation, RCC will comply with the service quality standards established in Docket 5903, with clarifications set forth in the following three findings." Each of the following findings deals with consumer protection, rather than service quality. 97

We are not persuaded that this Board or any of the parties to Docket 5903 or Docket 5918 ever thought that the service quality reporting requirements of Docket 5903 would apply to wireless carriers.

We concur with the DPS's and RCC's recommendation. RCC subjected itself to the broader "service quality" category in Docket 5918, with some qualifications that the parties did not at the time define. We see no evidence before us to indicate that anyone ever thought that RCC was subject to the narrower "service quality" periodic reporting requirements.

In conclusion, RCC's service quality commitments weigh in favor of designation, although the company's failure to comply with the CTIA mapping requirement by the date of

<sup>94.</sup> Id.

<sup>95.</sup> ITC Brief of 9/13/04 at 14; ITC Supplemental Reply Brief of 9/20/04 at 8.

<sup>96.</sup> Page 10, paragraph 38,

<sup>97.</sup> A similar use of the term "service quality" when the context refers to consumer protection occurs on page 44, paragraph 3, and in ordering clause 4c of the Docket 5918 final order.

hearings is a significant offsetting factor. As a condition of ETC designation in this proceeding, RCC should be required to abide by the consumer protection standards embodied in Docket 5903 as appropriately modified in the Amended Stipulation in Docket 5918, but not the service quality reporting standards.

# C. Improved Services By Incumbents

# **Findings**

- 92. Rural areas historically have trailed urban areas in receiving competitive, local exchange service and advanced telecommunications services, and in some rural areas no meaningful choice of local exchange carrier exists. Supporting Memo at 16-17.
- 93. If RCC is designated and expands its network, some consumers will choose RCC as their principal service. Even where a customer uses RCC's service as an ancillary communications tool, RCC will provide a meaningful choice to subscribers in remote rural areas, which often have only one service provider. Pet. at 3; Kohler pf. at 3; Supporting Memo at 16-17; Lackey pf. at 15.
- 94. Investment by RCC in network facilities in rural areas will increase competition. This could spur competitive responses from other carriers. Service quality and customer service may improve, new investments in plant may be made, and wider local-calling areas, bundled service offerings and lower prices overall may be introduced. Supporting Memo at 17; Kohler reb. pf. at 12-13; Lackey pf. at 16; tr. 8/3/04 at 56, 59 (Wood).
- 95. The ITCs have recently sought and obtained a change in Vermont law that will allow them to offer packages that bundle basic exchange service and interstate or non-regulated services. Lackey pf. rebuttal at 10.

#### **Discussion**

Promoting competition was the greatest single theme of the 1996 Act. The Department and RCC predict numerous benefits from an increased RCC presence in areas served by the ITCs. They foresee faster development of advanced communications as carriers vie for a consumer's business. They also anticipate competitive responses in terms of service quality, customer service, local-calling area size, variety of service offerings and lower prices overall. These predictions are repeated frequently in FCC designation cases.

While these predictions are orthodox, they are also vague, unverifiable and probably overstated. They do not predict a specific response by particular carriers within a stated time frame. Rather, they assert general benefits that will appear at an indefinite future time.

Moreover, the predicted benefits seem more an assertion of the benefits of competition in general, or in the past, than a specific prediction of the incremental benefits that will be *added* as the result of designation here. Accordingly, the predictions disregard that the ITCs have already made changes to make their services more attractive to customers.<sup>99</sup> They also disregard that the ITCs have made extraordinary progress in deploying and marketing advanced services.

If even a small portion of the rosy predictions are correct, however, Vermont customers would receive at least some incremental benefit from induced ITC competitive responses.

Therefore, an increased RCC presence resulting from designation would generate an incremental competitive response, and that response would have at least some benefit to consumers in some portions of the ITC's service areas. Because the claims by RCC and the Department are so general, however, we do not attribute great weight to this factor.

<sup>98.</sup> The Act described itself as "An Act to promote competition and reduce regulation in order to secure lower prices and high-quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." See Pub.L. 104-104.

<sup>99.</sup> For example, they presuppose that it will be RCC that generates broader service packages than the incumbents, even though the findings show the incumbents have already sought legislation for this precise purpose.

### D. Revenue Effects on Incumbents

# **Findings**

- 96. Some consumers may choose RCC as their principal service, as opposed to confining their use of RCC's service to an ancillary communications tool. Approximately two or three percent of wireless customers typically terminate their landline service, although the percentage is increasing. Supporting Memo at 17; tr. 8/2/04 at 123 (Kohler).
- 97. Under the current federal support programs, entry of a CETC does not reduce a rural ILEC's support. In some programs, a decline in the incumbent's line counts or a decline in customer revenue can cause federal support to increase. Kohler reb. pf. at 4; tr. 8/3/04 at 24-27 (Wood).
- 98. Hypothetically, if 50 percent of an ITC's subscribers were to also subscribe to RCC's service, keeping their ILEC service, there would be no federal support effects on the ILEC. Tr. 8/3/04 at 24-26 (Wood); see also id. at 119-21 (Nishi).
- 99. Also hypothetically, if 50 percent of an ITC's subscribers were to subscribe to RCC's service, and all were to drop wireline ILEC service: (a) the amount of high-cost loop support and local-switching support received by the ILEC would stay the same; and (b) the amount of Long Term Support ("LTS") and Interstate Common Line Support ("ICLS") revenue would increase to offset a portion of the lost customer revenues. Tr. 8/3/04 at 24-26 (Wood); see also id. at 119-21 (Nishi).
- 100. A CETC receives high-cost support if it obtains and keeps a high-cost-area customer. Kohler reb. pf. at 5.
- 101. RCC has no plans to seek state USF support at this time, assuming that high-cost support were available from this fund. Kohler reb. pf. at 24.
- 102. If RCC is designated in this proceeding, that decision, combined with the Board's previous designation from Docket 5918, would produce an ETC designation for the entire state. RCC therefore is not "cream skimming" Vermont's service areas. Supporting Memo at 16; Kohler pf. at 2; see tr. 8/2/04 at 15-18 (Kohler).
  - 103. Some very rural areas within Vermont are contained within RCC's existing ETC Service

Area. Supporting Memo at 16; tr. 8/2/04 at 17 (Kohler).

- 104. RCC's incremental revenue from this docket will be approximately \$4.0 million, or 0.105 percent of the fund. Supporting Memo at 16; Kohler reb. pf. at 27; tr. 8/2/04 at 10, 142 (Kohler).
- 105. Vermont ILECs will receive almost \$19 million of federal support in 2004. From 1998 to 2003, universal service support to the nine Independents increased by \$7.2 million, or 73%. Kohler reb. pf. at 6; Lackey reb. pf. at 14.
- 106. The Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO") estimated that the USF would grow by approximately \$2 billion as a result of designation of wireless carriers as ETCs, however, that estimate was based on the assumption that all CMRS providers would be designated as CETCs. Nishi pf. at 9; tr. 8/3/04 at 93-94 (Nishi); Wood reb. pf. at 48.
- 107. Nationally, greater federal support increases have been produced by policy changes that benefit rural ILECs than by granting ETC designation to CMRS carriers. Kohler reb. pf. at 27; Wood reb. pf. at 51; tr. 8/3/04 at 6-7 (Wood); see Nishi pf. at 9; tr. 8/3/04 at 90 (Nishi).
- 108. Wireless carriers will pay approximately \$2 billion into the federal high-cost fund in 2004. Tr. 8/3/04 at 95-96 (Nishi).

#### Discussion

RCC's designation, and the subsequent expansion of wireless service, certainly will have at least some effect on ILEC revenues. We consider below first the effect on customer and access revenues, then the effect on federal support revenues.

The record shows that a small but growing percentage of customers simply drop their wireline service. Other customers keep both services, but decrease their wireline toll usage, thereby affecting access and interconnection revenues. All of this could affect the ITCs adversely. Even absent other events, this could make it more difficult for the ITCs to maintain service at comparable rates.

Decline in customer and access revenue must be a major concern of a utility commission in a rural state. Even using the "forward-looking" assumption of a newly installed efficient network, the average cost of providing telephone service in some areas of Vermont is in excess

of \$100 per line per month.<sup>100</sup> It is often said that competition drives out implicit subsidies. If so, the rates in these rural areas are headed upwards, and the arrival of wireless could be a significant contributing factor. If a substantial number of customers adopt wireless service as a substitute, the number of remaining wireline customers could in some cases be too small to maintain service without either very high rates or very large explicit subsidies.<sup>101</sup> This could accelerate the need for an explicit state universal service program. Vermont has not yet perceived a need for a state universal service fund, even though ten years ago the legislature anticipated such a fund might be needed soon.<sup>102</sup>

Granting RCC's petition here could also affect the ITCs' federal universal service support. The facts were explored in detail at technical hearings, and they led to unexpectedly sanguine conclusions. An ITC's federal support would not decline merely because RCC would sell wireless service to an ITC customer. Moreover, even if that customer then ceases subscribing to wireline service, some kinds of federal support remain invariant and other kinds actually increase to replace some of the lost customer revenues. In short, the immediate effects of increased competition are either null or, in a "worst case," increase ITC support.

The ITCs foresee harm through systemic change. They suggest that designating RCC here would increase the risk of catastrophic future failure of universal service support programs or, at the very minimum, significant changes to federal rules about how support is calculated.

The ITCs certainly have good reason to worry about the overall health of the universal service system; they rely heavily upon it. But if the federal universal service program is threatened by its own size, there are many possible culprits. Support paid to wireless carriers

<sup>100.</sup> These cost estimates were produced for rural exchange areas served by Verizon. Exchange areas served by the ITCs are similar in many ways.

<sup>101.</sup> The DPS argued in its comments on the Proposed Decision that the Independents have the ability to respond to wireless competition by offering "packages" that bundle basic exchange service and interstate or non-regulated services. This is true, and it may alter the number of customers who would leave the wireline network or use wireless as a cheaper alternative. The argument, however, relates only to the speed of a transition, not to its ultimate effects; it does not address the underlying problem of supporting a wireline service with fewer remaining customers and less usage.

<sup>102.</sup> See 30 V.S.A. § 715(a) (Legislature intends that state fund be used as a means of "keeping basic telecommunications service affordable in all parts of this state.")

certainly has grown dramatically, but schools and libraries also have drawn heavily from the federal funds for many years. Moreover, the FCC has significantly expanded the size of the federal fund by using universal service as a mechanism to finance interstate access reform, such as through the creation of the "Interstate Access Support" and "Interstate Common Lines Support" ("ICLS") programs. Additionally, as RCC showed, rural incumbent carriers have been able to substantially increase their own draw on the fund, partly as a result of 2001 reforms to existing programs and partly through the addition of the costly new ICLS program.

There is no evidence that the federal universal service fund faces imminent failure. Moreover, the designation of RCC in Vermont will have a *de minimis* effect on that national fund. RCC's designation will increase the federal universal service fund by slightly more than one tenth of a percent. This in itself is highly unlikely to alter the future course of the national fund.

The ITC's best argument is that the fund may be in jeopardy if Vermont and other states designate too many wireless carriers. In that event, the FCC may be tempted to make some changes to funding rules. The ITCs are correct that there is widespread concern about the size of the federal universal service fund. But changes to the funding rules are still speculative at this time.

Even assuming a decision to reduce the total amount of federal support, it is far from clear that the reductions would be felt by the ITC community. For example, the FCC faces strong Congressional concerns about changes to ILEC support, and even the Joint Board's recent recommendations included statements that rural companies be held harmless from support reductions.<sup>103</sup>

Finally, even if subsequent changes to federal law were to cause problems for the ITCs, <sup>104</sup> the Board may still have remedies. For example, it is possible that the FCC might adopt certain measures that disadvantage incumbent LECs after a second ETC has been designated in their areas. Even then, there is a possibility that the Board could "vacate" the

<sup>103.</sup> Wood reb. pf. at 29-30.

<sup>104.</sup> One such scenario would be the adoption of a a primary line cap upon designation of a second ETC in a service area without any hold harmless support. See tr. 8/3/04 at 119-121 (Nishi).

original designation, retroactively voiding it as though it had never existed. 105

For these reasons we conclude that the possibility of a future change to federal universal service support rules is too speculative to be considered here in the public interest weighing test. These national issues are best addressed by the FCC and the Federal State Joint Board on Universal service.

In conclusion, designation of RCC seems likely to make it more difficult for the ITCs to continue to provide service without relying on rate increases or enactment of a state universal service fund. This is likely to arise primarily due to erosion of customer and access revenue, not federal support. Thus the financial effects on the ITCs counts as a negative factor in evaluating the overall public interest.

### E. Secondary Economic Benefits

# **Findings**

- 109. Designation and the resultant investment will cause RCC to spend money locally to construct the additional facilities and to maintain its network. Those expenditures will generate employment, income, tax receipts, and an increased property tax base, all of which will promote the general welfare of Vermont's economy. Lackey pf. at 16.
- 110. Additional wireless deployment will also provide an economic-development benefit because the quality of telecommunications networks is a critical factor for businesses deciding whether to locate or remain in a rural area. Business and community leaders, as well as ski and golf resorts, often say that they need high-quality networks to permit contractors, farmers and other businesses that rely on mobile communications to conduct their businesses efficiently. Kohler reb. pf. at 16.

#### Discussion

The record shows that federal support received by RCC and spent in the local community will have some flow-through effects. Although the chain of causation is long, designating RCC will lead to increased spending in Vermont, and that will have some beneficial economic effects

<sup>105.</sup> Tr. 8/3/04 at 171-172 (Meredith).

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for the state.

#### F. Public Interest

Designation of RCC in the service territories of Vermont's ITCs would serve the public interest. The benefits that will flow from such a designation are in excess of any harm that may be caused.

Assuming that RCC honors its commitments, the chief benefit is the availability of additional federal support to expand wireless coverage. This is augmented by RCC's service quality commitments and by secondary economic benefits from the associated capital investment. Some beneficial effect on the incumbents' service quality may also occur as a competitive response.

The chief foreseeable harm is a decline in customer revenues for the ILECs, who stand to lose some lines and some network usage. Surprisingly, federal support will not decline (unless there are significant changes in federal policy). To the contrary, federal support programs will partially offset customer revenue reductions.

The likely long-term financial effects on the ITCs counts as a significant negative factor. However, we agree with RCC's witness Don Wood who counseled that it is probably better in the short term to increase federal support, thereby making wireless service more available to rural subscribers. In the long-run, this Board (and the FCC) may face more difficult issues of whether it is feasible to continue using universal service payments as a principal tool for supporting two or more carriers. At that time, the Board may not be able to return the state precisely to the status quo ante, but it will still have tools to ensure that rural areas retain telephone service at reasonable rates.

The ITC's raise an additional argument regarding competitive equality. <sup>107</sup> They maintain that RCC seeks competitive equality in support, but the two kinds of service providers have numerous fundamental differences. These differences affect which companies are rate-regulated,

<sup>106.</sup> Wood reb. pf. at 53-57.

<sup>107.</sup> See, e.g., ITCs Brief at 18.

which companies have meaningful carrier-of-last-resort responsibilities, and which companies have equal access responsibilities. These differences are real, and they are financially significant; but they are not relevant. Essentially, the ITCs argue that it is against the public interest to give equal support to RCC because RCC does not share all of the ITCs' burdens. This argument, while emotionally appealing, has no legal merit.

Overall, designating RCC as an ETC is consistent with the public interest. We reach this conclusion assuming that the Board will impose the conditions described in Appendix A, hereto.

### XI. Number of Service Areas

A competitive ETC (or "CETC")'s ETC Service Area is the area defined by a state commission. <sup>108</sup> If the Board grants designation to RCC, it could establish one, two, or ten service areas.

The ITCs propose ten service areas, one new area for each of the nine ITCs. The ITC's argue that federal support funds generated in a rural ITC's study area should, more or less, be used in that study area, and not elsewhere. With ten service areas, the ITCs argue that the Board can ensure that federal "support from one area is rationally related to [ensure] a benefit to the customers on which that support is based. Also, the ITCs argue that a "fact-specific" analysis requires consideration of each ITC study area separately. In the end, the ITCs argue that "the plain meaning of the applicable federal statute and federal regulations concerning the definition of service areas served by rural telephone companies" requires a single service area.

The DPS is willing to accept either one or two service areas. RCC would prefer a single service area.<sup>113</sup>

We establish a single service area. While the ITCs raise legitimate issues about the need

<sup>108. 47</sup> C.F.R. § 54.207(a). In areas served by rural telephone companies, the local-exchange carrier's "service area" is its study area unless and until the FCC and the states establish a different definition of service area, taking into account the recommendations of the Federal-State Joint Board on Universal Service. 47 C.F.R. § 54.207(b).

<sup>109.</sup> Tr. 8/3/04 at 124 (Nishi); RCC Brief at 21.

<sup>110.</sup> ITC Brief at 22.

<sup>111.</sup> Id.

<sup>112.</sup> ITC Comments of 9/13/04 at 21-22.

<sup>113.</sup> RCC Brief at 43; Kohler pf. at 2; tr. 8/2/04 at 15-18, 131 (Kohler).

for uniform deployment of wireless facilities into rural areas, their proposed solution is not required by the law, and it overlooks numerous technological, economic and administrative difficulties.

The ITCs argue that the federal statute supports their view. Federal law defines "service area" to mean:

a geographic area established by a State commission (or the Commission under paragraph (6)) for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c) of this title, establish a different definition of service area for such company. 114

The ITCs argue that the italicized language, relating to rural telephone companies, requires that RCC's service area be coterminous with the ITC's own "study areas."

The ITCs correctly identify the relevant statutory and regulatory sections in their analysis, but they have failed to properly interpret that language. A service area is a geographic area that is established by a state commission for the purpose of determining universal service support and obligations. As a general rule, the Board has broad discretion to define a service area for any carrier seeking ETC designation, including both incumbent and competitive carriers.

The ITCs' argument focuses on the exception to this general rule, italicized above. We conclude that the exception applies only when a rural telephone company seeks ETC designation for itself. Congress may have had reasons to prevent state commissions from breaking up or aggregating existing rural ILEC "study areas," which traditionally were the units for which universal service support was paid. We see no reason to believe, however, that this language applies to a competitive ETC. On the contrary, a CETC like RCC doesn't even have a "study area" because it isn't an incumbent and has never received support that traditionally was tied to study areas. Therefore, we conclude that the italicized language above clearly *does not* apply to a case, such as this one, where a competitive carrier seeks ETC designation. Therefore the general

<sup>114. 47</sup> U.S.C. § 214(e)(5) (emphasis added).

<sup>115. -47</sup> U.S.C. § 214(e)5) and 47 C.F.R. § 54.207(a).

rule applies, and this Board has broad discretion to assign a service area.

The ITC's arguments also create numerous policy difficulties. The effect of the ITC's recommendation is that where support is based upon facts measured at a certain place, support must also be spent in that place. We reject this argument. Congress might have done this if federal support were actually *collected* from customers in the ITC areas where it is distributed. Support, however, is collected nationally from all industry sectors, including the wireless industry.

Technologically, the ITCs recommendation would produce wasteful expenditures, because it fails to recognize that wireless networks serve at a distance. Plant located outside an ITC's existing service area can still provide service within that area, and vice-versa. The point is particularly significant in Vermont because some of the ITCs serve only a single exchange area or "wire center" that only is a few miles across. For this reason, ten service areas, each with their own accounting, could produce substantial duplication of facilities and ultimately an inefficient wireless network.

Nor would ten service areas make economic sense. Wire center boundaries were defined long ago based on two things: the technical limits of wireline technology; and the economics of wireline technology. Neither factor today has much bearing on where wireless investments are needed in Vermont. As RCC's witness Kohler put it, wire center boundaries "don't have any meaning in [the wireless] business." Moreover, if there were ten service areas, RCC could not invest any support in a high-cost area where it had no customers, because there would be no support generated in that area.

Ten study areas would be likely to hamper timely and effective investment. Federal support would build up in ten separate bank accounts, and could not be transferred between

<sup>116.</sup> RCC's support for a customer will depend on the location where that customer is billed and on the average characteristics of the incumbent telephone company at that location. A customer in a high-cost ILEC area will produce more support for RCC than a customer in a low-cost ILEC area.

<sup>117.</sup> See tr. 8/2/04 at 19 (Kohler) (radio service "does not understand wireline boundaries, and so oftentimes the best cell site to serve Topsham community is not necessarily in Topsham.").

<sup>118.</sup> See, e.g. tr. 8/3/04 at 115-116 (Nishi).

<sup>119.</sup> Tr. 8/2/04 at 16 (Kohler).

accounts to meet more pressing needs elsewhere. One area could get a new cell site only when its capital reserve grew sufficiently, possibly a matter of years or even decades. In the interim, large amounts of support would be left unused, providing no benefit to the state. Under the best of circumstances this would delay construction in many areas. At worst, some areas might never get service if they generate little federal support.<sup>120</sup> We conclude that a single service area will more promptly result in meeting the needs of the state as a whole.

Establishing ten service areas would essentially create significant administrative burdens. It would require RCC to keep ten sets of accounts on universal service revenue and capital expenditures. This would obviously be a significant burden, but in the end accuracy may be unattainable, regardless of the effort expended. Many of RCC's facilities, such as backhaul facilities and switches, are network facilities and are not properly attributable to one cell site, much less to one wireline exchange.

It is a closer question whether the Board should establish one or two service areas, one for Verizon and the other for the ITCs taken as a whole. This would create some assurance that ITC areas receive, at least roughly, a share of RCC's investment for network expansion. However, even this choice presents some problems. It suggests, inaccurately, that facilities built in Verizon's territory serve only customers with addresses in Verizon's territory, and vice-versa. The harm is less than with ten service areas, but they have the same nature. Moreover, since there is more money per capita available in the ITC areas, it would produce a wireless network that favors the areas served by the ITCs. We see no valid public policy reason to do this.

We are also persuaded by the transactional nature of RCC's duties to prospective customers. The ITCs' suggestions are motivated by a laudable desire to get deployment of cell sites into rural areas. But RCC is committed here to – and its continued designation depends upon – effectively responding to reasonable consumer requests for service. A single service area

<sup>120.</sup> In their Reply Brief filed on 9/13/04, the ITCs asserted that support could be "allocating the costs of that cell site proportionately among the rural service areas in accordance with the respective benefit that each area would receive." Brief of 9/13/04 at 23. However, this is only a partial response because it assumes that Vermont ITC study areas are adjacent and will share a benefit from a single facility. This is only true in limited cases. More common would be a situation, which the ITCs apparently abhor, in which the benefit of a new facility would be shared between an ITC study area and the area served by Verizon Vermont.

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would be coterminous with its FCC license boundaries, allowing RCC to think about its service to the state as a single entity. This should produce a more reliable system for ensuring that rural customers who want cell phones will be able to get them.

We conclude as a matter of policy that a single service area is the best approach. Its greatest advantage is that it provides RCC with great flexibility in planning to meet the needs of the state as a whole and to make capital available for areas with the greatest need.

#### XII. DURATION OF DESIGNATION

In Docket No. 5918, the Board designated RCC as an ETC for areas served by Verizon, which is Vermont's only nonrural incumbent carrier. That designation expires on December 31, 2005. At that time, the Board will consider whether to extend the designation, and it will have a chance to evaluate RCC's progress in meeting the conditions imposed in the 5918 Order.

The conditions recommended here are broadly similar to those imposed in Docket 5918. This suggests coincident expiration of the two ETC designations. Given that wireless service has little regard for wireline exchange area boundaries, a single proceeding would be more efficient for the Board and would also allow RCC to focus its efforts on a single, effective system, rather than two similar subsystems.

Designation for a fixed duration will require a proceeding in 2005 if designation is to continue. This will have several benefits. It will allow the Board to test RCC's actions to meet the many commitments it has made here. It will allow the Board to determine the degree to which designation has produced the benefits anticipated in the preceding public interest analysis. In conjunction with data that should be available at that time on actual signal coverage, a 2005 review will allow the Board to determine whether continued designation of the entire state is justified.

The ITCs also point out that there are significant uncertainties in federal law at this time.

The Joint Board has suggested a number of fundamental changes to the ETC designation process,

and the FCC may be considering other changes that would limit support to the ITCs.<sup>121</sup> The ITCs maintain that this should cause the Board to delay a decision here. While we disagree with that recommendation, the ITCs have identified some potential risks that can be minimized by granting designation for a relatively short period. The FCC is expected to clarify at least some of these issues by February of 2005.<sup>122</sup> Before the first designation expires, the FCC may have removed some of the present uncertainties.

Accordingly, the designation of RCC as an ETC in service areas served by ITCs will expire on December 31, 2005, at the same time as RCC's exisiting designation under Docket 5918. RCC does not object.<sup>123</sup>

## XIII. CONDITIONS AFFECTING SERVICE COVERAGE

## **Findings**

- 111. If the Board failed in a given year to make a certification of an ETC for continued support, the ETC could still self-certify and would continue to receive ICLS support. This is true of incumbent carriers, who receive ICLS support based on their own costs, and competitive carriers, whose support is equal on a per-line basis to the local incumbent. Tr. 8/3/04 at 149 (Meredith).
- 112. ICLS support accounts for approximately 50%, or approximately two million dollars, of the 2005 Federal support RCC is expected to receive. Tr. 8/3/04 at 149 (Meredith).

# **Discussion**

This section proposes some conditions to be imposed on RCC. These conditions are related to the current legal consequences of designation, some of which may not be revocable. They also are related to the importance of RCC's commitments to expand the wireless network in the state.

Once RCC is "designated" as an ETC, FCC rules do not provide for withdrawal of ETC

<sup>121.</sup> For example, the ITCs point to the "possibility of per-line caps, primary line restrictions and other mechanisms designed to curb the growth of the Universal Service Fund."

<sup>122.</sup> Nishi pf. at 5.

<sup>123.</sup> RCC Brief at 37.

designation. However, all parties agreed that the Board can revoke RCC's designation for non-compliance. 124

States must "certify" each ETC annually in order for that ETC to receive support. The ITCs point out that there are significant differences between a state commission's failure to grant annual "certification" and the original absence of an ETC "designation." One difference regards ICLS support, which is intended to cover costs that are separated to the interstate jurisdiction. Because designated ETCs are permitted to "self-certify" for ICLS, benefits are paid even to an ETC that has not received state certification. In RCC's case, this will amount to approximately half of its expected support. Accordingly, the ITCs argue that the Board should not place undue reliance on annual certifications as a means of ensuring that RCC meets its commitments here. We agree with the ITCs' conclusion, but we also conclude that the risk can be managed by imposing meaningful conditions that reduce the future risk of decertification.

As noted in Section X above, the principal benefit of designation is the prospect of expanded cell telephone usage in Vermont. But to deliver on this promise, RCC must do some things right.

First, it must apply federal support to the promised purposes, and it must not use that money for competing goals such as the GSM upgrade project<sup>125</sup> and the need to improve E-911 locational abilities.<sup>126</sup> There is significant uncertainty in RCC's construction plans, beginning in January of 2005.<sup>127</sup> While more detailed plans may not be required or even practicable, their absence leaves RCC's future use of federal support somewhat undefined. Moreover, although RCC will receive an additional \$4 million per year as a result of designation, <sup>128</sup> it has

<sup>124.</sup> E.g., tr. 8/2/04 at 126-27, 141 (Kohler), 198-99 (Lackey); tr. 8/3/04 at 15-16 (Wood), 152 (Meredith). It is also possible that the Board could "vacate" its original Order, making it retroactively void, although the existence of that authority and its effects are in dispute. Meredith pf. at 8. Even if retroactive vacation is possible, its effect is unclear. The ITCs assert that if the original designation were vacated, RCC would have to repay all universal service support received to date. This, they assert, would make vacation of the Order very unlikely. ITC Brief of 9/13/04 at 24-25.

<sup>125.</sup> See finding 71, above.

<sup>126.</sup> See finding 30, above.

<sup>127.</sup> See findings 70-75, above.

<sup>128.</sup> See finding 66, above.

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conditionally committed to build only four more cell sites. The approximate cost of those four sites should be approximately \$1 million, 129 or about one-fourth of RCC's expected incremental federal support revenue.

In addition, discussed above, RCC must develop appropriate sales procedures and training for dealing with customer service requests. Without that, customers may simply be turned away whenever serving them might be somewhat inconvenient or expensive for RCC.

All of this suggests the need for some conditions that will ensure continuing actual improvement in RCC's effective coverage of its service area. We impose several conditions.

First, the Department has recommended that RCC be required to inform customers at the time of sale that they can ask for service extending measures if they have a weak signal. We concur. The record is unclear about how helpful the RCC sales force actually is at explaining that a potential customer who cannot obtain satisfactory service using standard equipment has other options available. While RCC made a similar commitment in Docket 5918, RCC does not seem to have yet adopted a clear policy for its retail employees, and there apparently has been little or no training. Strong policies and practice are essential if RCC is actually to offer customers something more than a take-it-or-leave-it approach to standard equipment service.

Second, we agree with the Department that RCC should continue to file annual reports, originally required in Docket 5918,<sup>132</sup> describing federal support amounts and capital construction spending ("Support and Construction Reports"). These reports, due on or before September 1, facilitate annual certifications required each year on or before October 1 under Section 254(e) of the Act, that RCC will use federal support "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." <sup>133</sup>

Absent detailed advance planning, the Support and Construction Report is also the chief

<sup>129.</sup> The average cost of a new cell site is \$250,000.00. See finding 53, above.

<sup>130.</sup> DPS Brief at 13.

<sup>131.</sup> See finding 55, above.

<sup>132.</sup> Docket No. 5918, Order of 11/14/03 at 52.

<sup>133.</sup> See 47 U.S.C. § 254(e); 47 C.F.R. § 54.313. Under Docket 6530, the ITCs are required to file two reports per year, but that is a consequence of the fact that these companies are rate regulated in two jurisdictions and are subject to cost separations.

vehicle to ensure that RCC will indeed expand the geographic scope of its service rather than using support designed for high-cost areas to enhance services in more densely populated areas. Without this report, RCC might be tempted to apply its new federal support to other uses unrelated to the public interest analysis above. RCC recognizes an obligation to demonstrate that every dollar of Federal support is "invested to construct, maintain, and upgrade RCC's facilities." Yet RCC is also installing new GSM equipment that will continue to support voice service but will also support advanced data services. RCC also may have to overbuild its existing areas with more cell towers in order to provide better E-911 locational information. Requiring a recurring report on fund usage will keep RCC better focused on geographic signal expansion.

Third, beginning in 2005, the Support and Construction Report should include an additional section describing the actual extent of RCC's geographic coverage.<sup>134</sup> As recommended by the Department, this should be based on a compilation of the percentage of Vermont E-911 addresses, by LEC wire center area or by municipality, in which RCC is capable of providing service at the time the report is prepared.<sup>135</sup>

Fourth, beginning in 2005, the Support and Construction Report should include a new section reporting on RCC's experience offering non-standard measures to extend service to customers in Vermont ("service extending measures"). This report should describe the number and location of people in RCC's Vermont service territory who have requested service extending measures, the nature of the measures tried, the number of times that such measures were successful in providing reliable service. 137

RCC asks for reconsideration of the Board's previous instructions regarding the Support

<sup>134.</sup> If this condition is adopted, the Department recommends that the Docket 5918 coverage sampling requirements be superceded, as RCC and the Board would have a reliable means of evaluating coverage without the on-site sampling. See ¶ 4.1.1 of Docket 5918, Order of 11/14/03. Lackey pf. at 18.

<sup>135.</sup> We also concur with the Department that the coverage sampling and reporting required by paragraph 4.1.(1) in the Docket 5918 Order of 11/14/03 should be displaced and the new recommendation substituted for both rural and non-rural areas.

<sup>136.</sup> The Department recommended that this information be collected and retained, but not that it be reported regularly. Rather, the DPS anticipated reviewing the information as a part of preparing for any redesignation proceedings. Tr. 8/3/04 at 82 (Frankel).

<sup>137.</sup> The Department believes this will assist in an evaluation of how effective RCC's procedures are in responding to requests for service. Frankel pf. at 11-12.

and Construction Report. In Docket 5918, construction spending explicitly excluded expenditures to comply with existing E-911 obligations and expenditures to comply with number portability requirements. The Hearing Officer's reasoning was that expenditures made primarily to comply with existing obligations and expenditures "arise from sources of law unrelated to universal service." The Board affirmed, holding that:

expenses incurred as a result of compliance with existing federal and state mandates unrelated to universal service, such as E-911 or LNP implementation, are properly excluded from capital construction spending supported by universal service funds.<sup>139</sup>

RCC has sought reconsideration of the treatment of its E-911 expenditures. First, RCC argues that it has "demonstrated its capability and commitment to extend this service throughout its proposed ETC service area." Second, RCC argues that no similar limitations apply to incumbent LECs, and they may have spent federal support, in part, to support E-911 activities. 141

RCC's fundamental legal analysis is accurate. Federal support must be used "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." Those purposes include constructing and operating facilities used to provide the nine supported services to existing customers. There is no federal requirement that federal universal service support be limited solely to geographic expansion of existing service. The incumbent LECs, for example, are under no such obligation, and they are free to use federal support to maintain and operate existing facilities. It would be error to hold that federal law requires RCC to expend all universal service receipts solely for geographic expansion.

At the same time, whether designation is in the public interest is a central issue in this docket. We concluded above that designation is in the public interest, largely because incremental federal revenues will allow RCC to extend geographic coverage into the state's rural

<sup>138.</sup> Docket No. 5918, Order of 11/14/03 at 36.

<sup>139.</sup> Docket No. 5918, Order of 11/14/03 at 48.

<sup>140.</sup> RCC Brief at 10-11.

<sup>141.</sup> See tr. 8/3/04 at 105 (Nishi).

<sup>142.</sup> See 47 U.S.C. § 254(e).

areas. If RCC files a construction report, but that report fails to differentiate between a new urban cell tower that improves E-911 accuracy and a new rural cell tower that expands coverage, a principal advantage of designation could be dissipated.

RCC also maintains that FCC accuracy requirements create incentives for a rural wireless carrier to deploy new cell towers near existing towers (typically found in lower-cost and more urbanized areas) to improve accuracy. Conversely, building new towers in rural areas to extend service, although it is consistent with universal-service goals, can reduce E-911 accuracy. <sup>143</sup> To offset this incentive, RCC recommends that the capital spending reports be allowed to include expenditures for E-911 equipment. Unfortunately, the facts cut against RCC's position. If there are new incentives for RCC to spend universal service on things other than network expansion, that only *increases* the need to protect network expansion funds.

The DPS has suggested adding a new element to the Support and Construction Report based on actual coverage data. A results-based reporting system can properly reduce reliance on financial reporting systems, which are based on inputs, not outputs. This E-911 spending dispute illustrates the difficulties in input-based analysis.

We clarify our earlier position and recognize that federal universal service support may be used to maintain and operate existing equipment, as well as to meet other federal mandates, including E-911 accuracy. More broadly, we reconsider and withdraw the equation stated in Docket 5918 that RCC has a burden to demonstrate that its construction spending is greater than or equal to the sum of its original construction spending plus its network expansion spending. The parties' arguments regarding E-911 funding have convinced me that precise compliance with this equation creates more problems than it solves.

We refrain here from attempting to explain to RCC what it must show in 2005 to have its designation extended. Of course, the same two fundamental facts will still be in issue: federal support; and construction spending. But the analysis should take into account a large number of factors, many of which cannot be adequately predicted today. The conditions set out in Attachment A reflect this change.

<sup>143.</sup> Tr. 8/3/04 at 21-22 (Wood).

#### XIV. CONCLUSION

Based on the preceding findings and discussion, RCC will provide the services that are supported by the federal universal service support mechanisms, on a non-discriminatory basis, using its own facilities or a combination of its own facilities and resale of another carrier's services, and it will advertise the availability of such services. Designating RCC as an ETC is in the public interest. RCC has adequate financial resources to serve the area, that it has the ability to remain functional in emergencies, and that it is likely to meet the state's consumer protection requirements. RCC's service area should be the entire state of Vermont. The designation should sunset at the end of 2005, and be renewable.

The designation should be subject to the conditions described in Appendix A, which are necessary to protect the public interest.

#### XV. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

- 1. The Board hereby designates RCC as an ETC under 47 U.S.C. § 214(e), with a Service Area covering the entire state, including areas served by rural telephone companies.
- 2. Before October 1, 2004, the Board will certify to the Federal Communications Commission that RCC complies with § 214(e) and is eligible for federal universal service support in 2005.
  - 3. Designation expires December 31, 2005.
  - 4. Designation is subject to the conditions described in Attachment A.
- 5. This Board retains continuing jurisdiction to review, modify, or revoke its designation of RCC as an ETC or to alter or amend the service area in all manners allowed to it under state and federal law, which may include dividing the service territory. This jurisdiction may be exercised on petition or at the discretion of the Board, in circumstances including but not limited to FCC alteration of the list of requirements for ETCs. The Board also reserves the right to alter service areas, including by dividing them or assigning to a rural carrier a service area other than

its current study area.

### 6. Redesignation.

- a. On or before October 1, 2005, RCC may file with the Board, with a copy to the Department, a certification stating that it wishes to extend its designation beyond December 31, 2005. The certification shall also:
  - (1) state that RCC continues to satisfy all of the requirements set forth in federal law for designation as an ETC (the "ETC Requirements"), including 47 C.F.R. § 54.101(a) as it may be amended from time to time;
  - (2) include detailed evidence regarding the scope of RCC's effective coverage. RCC shall provide a compilation of the percentage of Vermont E-911 addresses, by LEC wire center area or by municipality, in which RCC is capable of providing service at the time the report is prepared
- b. On or before November 15, 2005, any party to this proceeding 144 may object, stating that RCC does not continue to satisfy one or more of the ETC Requirements or has failed to comply with a condition of this Order ("Notice of Objection").
- c. If no Notice of Objection is filed, the Board shall issue a new designation Order extending the designation for an additional period.
- d. If a Notice of Objection is filed, the Board shall give RCC an opportunity for hearing. RCC will have the burden of demonstrating that it continues to satisfy the applicable ETC Requirements listed in the Notice of Objection. If it carries that burden, the Board may then renew the contested designation for an additional period.
- e. During the pendency of any proceedings under this paragraph, the current designation shall be extended without further notice or order.
- 7. <u>Non-Compliance</u>. The DPS or the Board may at any time provide to RCC a written Notice of Possible Non-Compliance relating to one or more of the ETC Requirements. In that event, RCC shall within 30 days certify in writing to the Board, and deliver a copy to the DPS,

<sup>144.</sup> The Hearing Officer had previously offered the right to object only to the DPS. We agree with the ITCs that they, too, should be allowed to demonstrate noncompliance in future proceedings.

that it continues to satisfy each of the ETC Requirements identified in the Notice of Possible Non-Compliance ("Claim of Continued Compliance"). The Board may revoke RCC's designation as an ETC or order such other remedies as the Board deems appropriate if either of the following occurs:

- a. RCC fails to file a Claim of Continued Compliance; or
- b. The Board determines, after opportunity for hearing, that RCC has not demonstrated that it continues to satisfy each of the ETC Requirements identified in the Notice of Possible Non-Compliance.

During the pendency of any proceedings under this paragraph, the current designation Order shall remain in effect. The DPS and RCC may at any time informally resolve or attempt to resolve compliance issues.

- 8. This Order is intended to restate and therefore supplant all procedures and requirements imposed in Docket 5918.
- 9. Unless there are pending motions, the Clerk of the Board shall close this docket on December 31, 2004.

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Dated at Mo	ontpelier, Veri	nont, this <u>29<sup>th</sup></u>	day of	September	_, 2004

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s/Michael H. Dworkin	)
	) Public Service
	) ) Board
	)
	) of Vermont
s/John D. Burke	)
	·
Office of the Clerk	
FILED: September 29, 2004	
ATTEST: s/Susan M. Hudson	<u> </u>
Clerk of the Board	

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.

# Attachment A - Designation Conditions

- 1. Offering Service. In order to effectively offer USF-required services throughout Vermont:
  - a. For any customer whom RCC is unable to serve at the customer's Preferred Usage Location, RCC shall continue to offer the right to cancel service with a refund within 30 days following purchase. Refunds shall include charges that are billed in advance, including the activation fee, the monthly access charge, and the price of the phone (if any), feature charges, and taxes and surcharges. Refunds shall not apply to third-party charges, such as per-minute roaming charges not included in the customer's plan.
  - b. RCC shall inform customers at the time of sale that they can ask for service-extending measures if they have a signal at their billing address or at a different address specified by the customer that represents the customer's home or work location ("Preferred Usage Location") that is not reliably useful using standard equipment.
  - c. RCC shall develop a protocol for making reasonable responses to requests for service-extending measures. The protocol shall discuss measures to be offered to customers, including customer-specific enhancements (such as external antenna kits and more powerful telephones) and system enhancements (such as adjusting RCC's antennas, using resale of wireline service, and constructing new facilities). The protocol may describe the order in which various measures will be tried. Within 60 days of this Order, RCC shall file that protocol with the DPS and the Board.
  - d. RCC shall design and implement a training program for its sales staff to ensure compliance with this paragraph.
- 2. <u>Emergency Services</u>. Not later than September 1, 2005, RCC shall request a waiver of the FCC rule requiring 100 percent accuracy coverage in Phase II of E-911 or take other action necessary to comply with all related FCC requirements.
- 3. <u>Blocked Calls.</u> As necessary, RCC will use a portion of the Federal support it receives to maintain a reasonably low frequency of blocked calls by users of the services for which RCC receives federal support. RCC shall report annually to the Board and Department beginning February 1, 2005, for each calendar month of the preceding year: (a) the number of RCC cell

sites serving Vermont that experience call blockage rates in excess of 2% during that month; (b) the number of RCC cell sites serving Vermont for which call blockage rates have exceeded 2% for six or more consecutive months; and, (c) the aggregate proportion of blocked calls at all RCC sites serving Vermont at all hours during that month. The call blockage rate will be calculated as the total blocked call attempts divided by the total call attempts made at each cell site. The call blockage rate for each site will be based on the respective one-hour "floating busy hour" intervals of each site, which may vary among cell sites. The "floating busy hour" is defined as the busiest hour over a 24-hour period. RCC shall, upon request, provide information on the call blockage performance of individual, specific cell sites to the Board or Department. 145

- 4. RCC will use a portion of the Federal support it receives to reduce the frequency of blocked calls by users of the services for which RCC receives Federal support. RCC shall comply with the call blockage conditions and metrics established in the Amended Stipulation and Board Order from Docket 5918.
- 5. RCC shall report to the Board, in writing, on or before September 1, 2005, and yearly thereafter while it carries this designation, the support received and the uses for which it's high cost support has been expended with particular dollar amounts attached to each.
- 6. <u>Consumer Protection</u>. RCC shall comply with the Board's Order in Docket 5903, Order of 7/2/99, with the following modifications:
  - a. The service quality requirements of that docket, and associated reporting requirements, do not apply to wireless carriers.
  - b. RCC does not publish a directory of its customers' telephone numbers. Should RCC provide such services in the future, it will comply with Docket 5903's requirements.
  - c. RCC will provide a 40 percent discount to persons who are deaf, speech impaired or hearing impaired.
    - d. RCC will provide discounts to persons who are blind or visually impaired.
    - e. Docket 5903 requires that customers cannot be disconnected for nonpayment

<sup>145.</sup> The text of this condition was provided by the DPS in comments filed on 9/15/04 at the request of the Hearing Officer.

of charges for toll and optional service. To implement this requirement, RCC will define the "local portion" of a customer's bill as the amount of \$25.00 plus any accumulated local airtime minutes. The \$25.00 charge will be the basis for the calculation of the amount required from a delinquent customer if the customer intends to keep his or her basic service. RCC may restrict these customers' basic service to a plan that prohibits roaming and toll calling. RCC may require a larger payment from a customer who insists on a plan that includes roaming and toll services.

- f. RCC will continue investigating the ability of its billing systems to apply customer payments first to the local service portion of a customer's bill.
- 7. <u>Deposits.</u> RCC shall comply with the provisions of PSB Rule 3.200, "Ratepayer deposits for gas, electric, water, telephone and cable service," with the following modifications:
  - a. Deposits will be refunded on the customer's anniversary date along with accrued interest, except for customers who were disconnected and customers who received more than three disconnect notices.
  - b. RCC will not require a deposit greater than two-twelfths of average annual revenue, an amount currently equal to \$110.00. RCC also will restrict some customers with poor credit ratings to a plan without toll or roaming capability, but such customers will still be able to make toll calls with prepaid calling cards.
- 8. <u>Disconnections</u>. RCC shall comply with the provisions of PSB Rule 3.300, "Disconnection of residential gas, electric, telephone and water service," with the following modifications:
  - a. Interception of outgoing calls is the method by which this wireless carrier "disconnects" service. Disconnection will be limited to persons who have received disconnection notices and in accordance with the rule.
  - b. Because RCC will continue to provide customer service 24 hours per day, seven days per week, it can restore service at any time. Therefore RCC is exempt from the time of day restrictions ("disconnection window") found in Rule 3.306. When a disconnected RCC customer calls RCC outside the disconnection window set forth in Rule 3.300, RCC will immediately restore service without payment, and RCC will inform the customer of the availability of assistance from the Department of Public Service in

resolving the complaint. Service will continue at least until the close of the next business day.

- 9. CTIA Code. RCC shall comply with the CTIA Consumer Code for Wireless Service.
  - a. Within 30 days of the issuance of this Order, RCC shall develop and submit to the Department and Board for review and Board approval, a plan for training staff, monitoring compliance and periodic reporting to the Board and Department concerning its compliance with the CTIA Consumer Code for Wireless Service.
  - b. RCC shall promptly provide at its retail outlets coverage maps sufficient to provide customers with detailed information about RCC's signal coverage.
- 10. <u>Lifeline and Link-Up.</u> RCC shall offer a Basic Service Package to customers eligible for Lifeline benefits.
- 11. <u>E-911</u>. By September 1, 2005, RCC shall either comply with the FCC's Phase II E-911 locational accuracy requirements or seek a waiver.
- 12. <u>Customer Notices.</u> RCC shall give subscribers the following notices in writing:
  - a. Annually, RCC shall notify subscribers that: (1) RCC's wireless-telecommunications services do not provide coverage in some areas of the state; and (2) in areas where coverage is available, subscribers may experience blockage such that calls may not immediately be completed.
  - b. Annually in the first quarter of the year, RCC shall notify subscribers of the total amount of USF funds received in the previous year as a result of its designation as an ETC and the approximate per-subscriber per-month benefit that support provides.
  - c. Annually in January or February, RCC shall notify subscribers about Lifeline availability and how to apply. The information shall be provided through bill stuffers.
- 13. Advertising. RCC shall advertise the following:
  - a. RCC shall continue to advertise the availability of its services throughout its licensed service area by media of general distribution, which may include newspaper, magazine, direct mailings, public exhibits and displays, bill inserts, and telephone-directory advertising.
    - b. RCC shall continue to advertise the availability of Lifeline and Link-up

benefits by including mention of such benefits in its advertising and by reaching out to community health, welfare and employment offices.

# 14. Studies and Records. RCC shall:

- a. Compile and update periodically an analysis of its geographic coverage, including the percentage of Vermont E-911 addresses, by LEC wire center area or by municipality, in which RCC is capable of providing service. This requirement supercedes the coverage sampling and reporting requirement imposed in Docket 5918. If RCC is unable to obtain information from the Vermont Enhanced 911 program, it shall utilize its own household data and other public data sources. RCC shall make a compliance filing within 60 days of the date of this Order describing how it intends to comply with this condition.
- b. Within 30 days of the issuance of this Order, RCC shall develop and implement a system to track the number of consumers who inquire about service-extending options, the number of customers who request such equipment, and the number of times the company provides or installs such equipment. Such information shall be retained for a period not less than five years from the service request date.
- 15. <u>Support and Construction Reports.</u> To facilitate the annual certifications required under section 254(e) of the Act, each year on or before September 1, RCC shall file a Support and Construction Report.
  - a. The report shall state and explain whether support has been and will continue to be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.
  - b. The report shall summarize all federal universal service support received between July 1 of the preceding year and June 30 of the current year.
  - c. The report shall identify the principal purposes of major capital expenditures made between July 1 of the preceding year and June 30 of the current year, and shall particularly explain: the extent to which those expenditures were in response to independent FCC obligations, including number portability requirements and E-911 accuracy requirements; and whether the expenditure facilitated enhanced high-speed data

services in existing service areas. The report shall also describe the location, by town, of any new cell towers or repeaters.

- d. The report shall also describe RCC's efforts to reduce call blockage and improve service overall.
- e. This report should describe the number and location of people in RCC's Vermont service territory who have requested service-extending measures, and for each person the nature of the measures tried and the number of times that such measures were successful in providing reliable service.
- f. The report shall also describe the percentage of E-911 addresses, by Vermont LEC wire center area or by municipality, in which RCC is capable of providing service.
- g. Until RCC has fully complied with the FCC's E-911 Phase II locational requirements, the report shall also describe the outlook for fully implementing those requirements.
- 16. <u>Subsequent Rules</u>. The preceding conditions may be modified by subsequent adopted and generally applicable administrative rule.

#### STATE OF NORTH DAKOTA

#### **PUBLIC SERVICE COMMISSION**

Northwest Dakota Cellular of North Dakota Limited Partnership Designated Eligible Carrier Application Case No. PU-1226-03-597

North Central RSA 2 of North Dakota Limited Partnership

Designated Eligible Carrier
Application

Case No. PU-386-03-598

North Dakota RSA No. 3 Limited

Partnership
Designated Eligible Carrier
Application

Case No. PU-897-03-599

**Badlands Cellular of North Dakota** 

Limited Partnership Designated Eligible Carrier Application Case No. PU-1225-03-600

North Dakota 5 – Kidder Limited Partnership

Designated Eligible Carrier
Application

Case No. PU-338-03-601

Bismarck MSA Limited Partnership Designated Eligible Carrier Application Case No. PU-494-03-602

#### ORDER

#### February 25, 2004

## **Preliminary Statement**

On October 15, 2003, applications for designation as an Eligible Telecommunications Carrier (ETC) were filed by: North Central RSA 2 of North Dakota Limited Partnership d/b/a Verizon Wireless (North Central RSA 2); Badlands Cellular of North Dakota Limited Partnership d/b/a Verizon Wireless (Badlands Cellular); North Dakota RSA 3 Limited Partnership d/b/a Verizon Wireless (North Dakota RSA 3); Bismarck MSA Limited Partnership d/b/a Verizon Wireless (Bismarck MSA); North Dakota 5 - Kidder Limited Partnership d/b/a Verizon Wireless (North Dakota 5); and

Northwest Dakota Cellular of North Dakota Limited Partnership d/b/a Verizon Wireless (Northwest Dakota Cellular); (collectively the Partnerships).

The Partnerships seek ETC designation for purposes of receiving federal universal service support for certain rural study areas and non-rural exchanges. For certain rural telephone company study areas not wholly within each applicant's FCC licensed service area, the Partnerships seek redefinition of those areas rural study areas. The Partnerships propose to provide universal services using its own facilities, or a combination of its own facilities and leased facilities, pursuant to 47 U.S.C. §214(e) and the FCC's regulations.

On October 22, 2003 the Commission issued a Notice of Opportunity for Hearing and Notice of Informal Hearing. An informal hearing was held on December 17, 2003. The notice stated that the Commission could determine the matter without a hearing.

The issues to be considered are:

- 1. The qualification of the applicant under the Telecommunications Act of 1996, Section 214(e) for designation as an ETC eligible to receive federal universal service funding.
- 2. The ETC universal service support area to be designated for the applicant.

On December 5, 2003, BEK Communications Cooperative, Consolidated Telcom, Dakota Central Telecom I, Dakota Central Telecommunications Cooperative, Dickey Rural Access, Inc., Dickey Rural Communications, Inc., Dickey rural Telephone Cooperative, Inter-Community Telephone Company, LLC, Missouri Valley Communications, Inc., Nemont Telephone Cooperative, Inc., North Dakota Telephone Company, Northwest Communications Cooperative, Polar Communications Mutual Aid Corporation, Polar Telecommunications, Inc., Reservation Telephone Cooperative, Turtle Mountain Communications, and United Telephone Mutual Aid Corporation; collectively the Rural Telephone Company Group (RTCG) filed a request to appear in the proceeding. The RTCG stated requested that, if the Commission does not deny the application for redefinition of study areas without a hearing, the RTCG requests a hearing.

On December 17, 2003 the applicants filed affidavits of Mark R. Smith, Director—Financial Reporting and Partnership Relations in support of the applications of the Partnerships.

On December 18, 2003 the Commission issued a Notice of Hearing.

On December 29, 2003 Inter-Community Telephone Company, L.L.C. filed a request to withdraw as an intervenor. The Commission granted the request on January 14, 2004.

On February 6, 2004, the parties filed a Joint Stipulation and six separate Service Area Stipulations setting forth an agreement to resolve objections of the RTCG.

On February 10, 2004, the Commission held an Informal Hearing.

#### **ETC Designation**

The Telecommunications Act or 1996 provides financial support for universal services to common carriers that have been designated as eligible telecommunications carriers (ETCs) and that (1) offer the universal services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services and (2) advertise the universal services, advertise the availability of such services, and advertise the charges for such services, using media of general distribution.

The universal services designated for support by Federal universal service support mechanisms include voice grade access to the public switched network, local usage, dual tone multi-frequency signaling or its functional equivalent, single-party service or its functional equivalent, access to emergency services, access to operator services, access to interexchange service, access to directory assistance, and toll limitation for qualifying low-income consumers.

Both federal law and state law provide that the Commission designate a common carrier as an ETC. In areas served by a rural telephone company, the Commission must find that ETC designation is in the public interest.

The affidavits of Mark Smith state that:

- Verizon Wireless is a common carrier, is licensed by the FCC to provide commercial mobile radio service (CMRS), and is currently providing CMRS throughout nearly all North Dakota.
- 2) The Partnerships will provide, throughout the areas in which they are seeking ETC designation, the required telecommunications services that are supported by universal service funding. The Partnerships will participate in Lifeline and Link-Up as required.
- 3) The Partnerships advertise the federally supported universal services throughout its requested designated service areas using different media of general distribution including newspaper, television, radio, and billboard advertising, and once designated, will advertise the availability of the supported services and charges using media of general distribution, in accordance with 47 C.F.R. § 54.201(d)(2).
- 4) The Partnerships will comply with all service area requirements, subject to the requested Commission's redefinition of the same.
- 5) Granting ETC designation to the Partnerships will serve the public interest by offering competitive services to North Dakota customers on a more even-handed basis than is the case today. The Partnerships' service offerings have a larger

local calling area as compared to the incumbent landline carriers, as well as benefits of mobility, and customers will be able to combine basic universal services with advanced data services if they so desire.

- 6) The Partnerships will use federal universal service support to provide universal services and extend its wireless networks in rural areas of North Dakota.
- 7) Designation of the Partnerships as ETCs will provide an incentive to the incumbent carrier to improve their existing networks in order to remain competitive, resulting in improved services and benefits to consumers including better service, lower rates, new technology, and provision of new and innovative services for consumers.

All areas for which the Partnerships request ETC designation, with the exception of the Qwest Corporation exchanges, are study areas of rural telephone companies.

The Partnerships agree that an applicant for ETC status is not required to be providing the required universal services to 100% of a service area before receiving designation as an ETC and that facilities to serve customers are required at some reasonable time after the customer agrees to the terms and conditions of the service provided. We continue to subscribe to this policy.

The Partnerships agree to provide quarterly reports describing the status of its E911 implementation in North Dakota.

## **Universal Service Support Areas**

The Commission must establish a geographic area (service area) for the purpose of determining universal service obligations and support mechanisms for the designated ETC. 47 U.S.C. § 214(e)(5).

47 U.S.C. § 214(e)(5) defines service area:

(5) SERVICE AREA DEFINED— The term "service area" means a geographic area established by a State commission for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company.

Table 1 lists, for purposes of federal universal service funding, the North Dakota study areas that have been established by the Federal Communications Commission and listed by the Universal Service Administrative Company (USAC) for incumbent local exchange companies (ILECs) serving customers in North Dakota:

TABLE 1

Study Area Name	Included Local Exchange Companies	
Absaraka Cooperative Telephone Co., Inc.	Absaraka Co-operative Telephone Company, Inc.	
BEK Communications Cooperative	BEK Communications Cooperative	
Consolidated Telcom	Consolidated Telcom	
Dakota Central Telecommunications Cooperative	Dakota Central Telecommunications Cooperative	
	Dakota Central Telecom I, Inc.	
Dickey Rural Telephone Cooperative	Dickey Rural Communications, Inc.	
	Dickey Rural Telephone Cooperative	
	Dickey Rural Access, Inc.	
Griggs County Telephone Company	Griggs County Telephone Co	
Inter-Community Telephone Company L.L.C.	Inter-Community Telephone Company, L.L.C.	
Midstate Communications Inc.	Midstate Communications Inc.	
Midstate Telephone Company	Midstate Telephone Company	
Moore & Liberty Telephone Company Moore and Liberty Telephone Compar		
Nemont Telephone Cooperative, Inc.  Nemont Telephone Cooperative, Inc.		
	Missouri Valley Communications, Inc	
Noonan Farmers Telephone Company	Noonan Farmers Telephone Company	
North Dakota Telephone Company	North Dakota Telephone Company	
Northwest Communications Cooperative	Northwest Communications Cooperative, a Cooperative Association	
Polar Communications Mutual Aid Corporation	Polar Communications Mutual Aid Corporation	
Polar Telecommunications, Inc.	Polar Telcom, Inc.	
Qwest Corporation	Qwest Corporation	
Red River Rural Telephone Association	Red River Rural Telephone Association	
	Red River Telecom, Inc.	
Reservation Telephone Cooperative	Reservation Telephone Cooperative	
SRT Communications, Inc.	SRT Communications, Inc.	
United Telephone Mutual Aid Corporation	United Telephone Mutual Aid Corporation	
	Turtle Mountain Communications, Inc.	
West River Telecommunications Cooperative	West River Telecommunications Cooperative	
Wolverton Telephone Company	Wolverton Telephone Company	

Table 2 lists, for purposes of federal universal service funding, the Minnesota study areas that have been established by the Federal Communications Commission and listed by the USAC for ILECs serving customers in North Dakota:

#### TABLE 2

Study Area Name	Included Local Exchange Companies	
Citizens Telecommunications Company of MN	Citizens Telecommunications Company of Minnesota, Inc.	
Halstad Telephone Co.	Halstad Telephone Company	
Loretel Systems, Inc	Loretel Systems, Inc.	

Table 3 lists, for purposes of federal universal service funding, the South Dakota study areas that have been established by the Federal Communications Commission and listed by the USAC for ILECs serving customers in North Dakota:

**TABLE 3** 

Study Area Name	Included Local Exchange Companies  James Valley Cooperative Telephone Company  Roberts County Telephone Cooperative Association	
James Valley Cooperative Telephone Company		
Roberts County Telephone Cooperative Association		
	RC Communications, Inc.	
Venture Communications Cooperative	Venture Communications, Inc.	
West River Cooperative Telephone Company	West River Cooperative Telephone Company	

Table 4 lists, for purposes of federal universal service funding, the Montana study areas that have been established by the Federal Communications Commission and listed by the USAC for ILECs serving customers in North Dakota:

**TABLE 4** 

Study Area Name	Included Local Exchange Companies	
Mid-Rivers Telephone Cooperative, Inc.	Mid-Rivers Telephone Cooperative, Inc.	

Table 5 lists the study areas for which the Partnerships request ETC designation and that do not require redefining:

TABLE 5

Applicant name	Study area(s) requested for designation not requiring redefinition under 47 C.F.R. § 54.207(c)
Northwest Dakota Cellular	Noonan Farmers Telephone Company
	Northwest Communications Cooperative
North Dakota RSA 3	Citizens Telecommunications Company of MN

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	Halstad Telephone Co	
	James Valley Cooperative Telephone Company	
	Roberts County Telephone Cooperative Association	
	Red River Rural Telephone Association	
	Venture Communications Cooperative	
	Wolverton Telephone Company	
	Qwest Corporation exchanges of Grafton, Minto, Northwood, Hatton, Mayville, Reynolds, Hillsboro, Jamestown, Valley City, Leonard, Kindred, Wahpeton, Gardner, Hickson and Thompson.	
Badlands Cellular	Consolidated Telcom	
	West River Cooperative Telephone Company	
	Qwest Corporation exchanges of Belfield, Mandan, Dickinson, Sidney MT, Fairview MT, McIntosh SD, and Morristown SD	
North Dakota 5	Qwest Corporation exchange of Jamestown	
Bismarck MSA	Qwest Corporation exchanges of Bismarck and Mandan	

The Partnerships have not requested that a designated service area include the Absaraka Cooperative Telephone Co., Inc. or Loretel Systems, Inc. study areas or the Qwest Corporation exchanges of Casselton, Comstock MN, Emerado, Fargo, Larimore, Manvel, Sabin MN, or West Fargo.

#### **Redefinition of Service Areas**

The Partnerships have requested that the Commission redefine the service area requirement for certain rural telephone companies from a study area to an individual wire center or partial wire center to the extent that the Partnerships' wireless service area does not cover the entirety of a rural telephone company's study area. Table 6 lists the rural telephone company study areas for which the Partnerships request redefinition.

TABLE 6

Applicant name	Requested redefined study areas under 47 C.F.R. § 54.207(c)	
Northwest Dakota Cellular	BEK Communications Cooperative	
	Midstate Telephone Company	
	Nemont Telephone Cooperative, Inc.	
	Reservation Telephone Cooperative	
	SRT Communications, Inc.	
	West River Telecommunications Cooperative	
North Central RSA 2	SRT Communications, Inc.	
	United Telephone Mutual Aid Corporation	

	North Dakota Telephone Company
	Midstate Communications Inc. (formerly known as York Telephone Company)
·	Polar Telecommunications, Inc.
	Polar Communications Mutual Aid Corporation
North Dakota RSA 3	Dakota Central Telecommunications Cooperative
	Dickey Rural Telephone Cooperative
•	Griggs County Telephone Company
•	Inter-Community Telephone Company LLC
*	Moore & Liberty Telephone Company
•	North Dakota Telephone Company
-	Polar Communications Mutual Aid Corporation
	Polar Telecommunications, Inc.
•	United Telephone Mutual Aid Corporation
Badlands Cellular	Mid-Rivers Telephone Cooperative, Inc.
	Midstate Telephone Company
•	Midstate Communications Inc. (formerly known as York Telephone Company)
	Reservation Telephone Cooperative
	West River Telecommunications Cooperative
North Dakota 5	BEK Communications Cooperative
-	Dakota Central Telecommunications Cooperative
	Dickey Rural Telephone Cooperative
	Griggs County Telephone Company
	North Dakota Telephone Company
	West River Telecommunications Cooperative
	SRT Communications, Inc.
Bismarck MSA	BEK Communications Cooperative
	West River Telecommunications Cooperative

Table 7 lists the requested service areas within the requested redefined study areas for which the Partnerships request ETC designation.

## TABLE 7

Applicant name	Requested designated service areas within study areas requiring redefinition under 47 C.F.R. § 54.207(c)	
Northwest Dakota Cellular	all exchanges and partial exchanges of BEK Communications Cooperative, Nemont Telephone Cooperative, Inc., Midstate Telephone Company,	

	Reservation Telephone Cooperative, SRT Communications, Inc., Missouri Valley Communications and West River Telecommunications Cooperative within the geographic boundaries of its Federal Communications Commission (FCC) licensed cellular service area in North Dakota (Rural Service Area 1 (RSA 1))
North Central RSA 2	all exchanges and partial exchanges of SRT Communications, Inc., Turtle Mountain Communications, United Telephone Mutual Aid Corporation, North Dakota Telephone Company, York Telephone Company (now know as Midstate Communications Inc.), Polar Telecommunications, Inc., and Polar Communications Mutual Aid Corporation within the geographic boundaries of its FCC licensed cellular service area in North Dakota (RSA 2)
North Dakota RSA 3	all exchanges and partial exchanges of Dakota Central Telecom I, Inc., Dakota Central Telecommunications Cooperative, Dickey Rural Access, Inc., Dickey Rural Communications, Inc., Dickey Rural Telephone Cooperative, Griggs County Telephone Company, Inter-Community Telephone Company LLC, Moore and Liberty Telephone Company, North Dakota Telephone Company, Polar Communications Mutual Aid Corporation, Polar Telecommunications, Inc., and United Telephone Mutual Aid Corporation within the geographic boundaries of its FCC licensed cellular service area in North Dakota (RSA 3)
Badlands Cellular	all exchanges and partial exchanges of Midstate Telephone Company, West River Telecommunications Cooperative, Reservation Telephone Cooperative, Mid-Rivers Telephone Cooperative, Inc., and York Telephone Company (now known as Midstate Communications Inc.) within the geographic boundaries of its FCC licensed cellular service area in North Dakota (RSA 4)
North Dakota 5	all exchanges and partial exchanges of BEK Communications Cooperative, Dickey Rural Telephone Cooperative, Dakota Central Telecommunications Cooperative, Griggs County Telephone Company, North Dakota Telephone Company, West River Telecommunications Cooperative, SRT Communications, Inc., Dakota Central Telecom I, Inc., and Dickey Rural Communications, Inc. within the geographic boundaries of its FCC licensed cellular service area in North Dakota (RSA 5)
Bismarck MSA	All exchanges and partial exchanges of BEK Communications Cooperative and West River Telecommunications Cooperative within the geographic boundaries of its FCC licensed cellular service area in North Dakota (Bismarck Metropolitan Statistical Area (Bismarck MSA))

#### Factors for Consideration

The Act and the FCC's regulations authorize the FCC and the Commission to act in concert to develop an alternative service area standard for areas served by rural telephone companies in accordance with 47 § C.F.R. 54.207(c)-(d). In defining a service area other than the study area we are required to take into account three factors as follows: (1) minimizing cream skimming; (2) recognizing that the 1996 Act places rural telephone companies on a different competitive footing from other LECs; and (3)

recognizing the administrative burden of requiring rural telephone companies to calculate costs at something other than a study area level.<sup>1</sup>

The first factor is the risk that a competitor would selectively target service only to the low cost areas of the rural ILEC's study areas. The affidavits of Mark Smith state that the risk of cream skimming has been practically eliminated because incumbent rural telephone companies can now utilize a process known as "disaggregation," which allows these companies to target their per-line support to better reflect the actual costs of serving different areas throughout their study areas. In the *Virginia Cellular ETC Order* the FCC determined that, because Virginia Cellular was limited to providing facilities-based service only where it is licensed by the FCC, and because Virginia Cellular commits to providing universal service throughout its licensed territory, concerns regarding cream skimming are minimized.<sup>2</sup> We find no evidence in this proceeding of rural cream skimming effects in redefining the service areas requested by the Partnerships.

The second factor to consider is the regulatory status enjoyed by rural telephone companies under the Act. The affidavits of Mark Smith state that nothing in the service area redefinition process for an ETC applicant affects the rural carrier's various statutory exemptions under the Act, nor does the redefinition process eliminate the public interest analysis to the designation of an additional ETC in the rural telephone company's service area. In the Virginia Cellular ETC Order the FCC determined that (1) the highcost universal service mechanisms support all lines served by ETCs in rural areas; (2) receipt of high-cost support by Virginia Cellular will not affect the total amount of highcost support that the incumbent rural telephone company receives; (3) to the extent that Virginia Cellular or any future competitive ETC captures incumbent rural telephone company lines, provides new lines to currently unserved customers, or provides second lines to existing wireline subscribers, it will have no impact on the amount of universal service support available to the incumbent rural telephone companies for those lines they continue to serve; and (4) redefining the service areas of the affected rural telephone companies will not change the amount of universal service support that is available to these incumbents.3 Based on the evidence in this proceeding we conclude that there is little likelihood of harm to the rural companies. No evidence in this proceeding regarding the regulatory status enjoyed by rural telephone companies under the Act leads us to conclude that the Partnerships' request for redefined study areas should not be granted.

The third factor to consider is whether any administrative burdens might result from the redefinition of the service area requirement. The affidavits of Mark Smith state that the administrative ease of calculating costs on a less-than-study area level is not an issue because any federal universal service support available to a competitive ETC in

<sup>&</sup>lt;sup>1</sup> In the Matter of Federal-State Joint Board on Universal Service; Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, CC Docket No. 96-45, Memorandum Opinion and Order, FCC 03-338, adopted December 31, 2003, released January 22, 2004 (Virginia Cellular ETC Order)

<sup>&</sup>lt;sup>2</sup> Id. ¶ 42

<sup>3</sup> ld. ¶ 43

an area served by one of the rural telephone companies would be determined based on the per-line support available to the rural telephone company itself. In the *Virginia Cellular ETC Order* the FCC determined that redefining the rural telephone company service areas will not require the rural telephone companies to determine their costs on a basis other than the study area level. Rather, the redefinition merely enables competitive ETCs to serve areas that are smaller than the entire incumbent local exchange company study area. The redefinition does not modify the existing rules applicable to rural telephone companies for calculating costs on a study area basis, nor, as a practical matter, the manner in which they will comply with these rules. The FCC found that the concern that redefining rural service areas would impose additional administrative burdens on affected rural telephone companies was not at issue.<sup>4</sup> No evidence in this proceeding regarding administrative burdens for rural telephone companies leads us to conclude that the Partnerships' request for redefined study areas should be denied.

The affidavits of Mark Smith state that redefinition is in the public interest because it will enable the Partnerships to bring new services and new technologies to customers of North Dakota's rural telephone companies, who now have no choice of universal service providers. The affidavit further states that, because competitor and incumbent licensed service territories are geographically different, and because the study areas of the rural telephone companies wide-ranging, it would be nearly impossible for any other competitive carriers to compete with the incumbents without redefinition.

#### State Statute Considerations

The North Dakota Legislature enacted N.D.C.C. § 49-21-01.8 in 1999. This law provides that "[a] telecommunications company may not be an eligible telecommunications carrier unless the company offers all services supported by federal universal service mechanisms throughout the study area." During the same session, the Legislature further amended N.D.C.C. § 49-21-01.7 relating to powers of the Commission, specifically granting the Commission the power to:

- 12. Designate telecommunications companies as eligible telecommunications carriers to receive universal support under sections 214 and 254 of the federal act.
- Designate geographic service areas for the purpose of determining universal service obligations and support mechanisms under the federal act.

The established rules of statutory interpretation under N.D.C.C. § 1-02-07 require the Commission, if possible, to construe provisions in the same statute so that effect can be given to all provisions. N.D.C.C. § 1-02-09.1 requires that amendments to a statute enacted at the same legislative session are to be harmonized, if possible, so that

<sup>&</sup>lt;sup>4</sup> ld. ¶ 44

effect can be given to each. N.D.C.C. § 1-02-38 provides that when the Legislature enacts a statute, it is presumed that the entire statute is intended to be effective, a just and reasonable result is intended, and that it complies with the constitutions of the State of North Dakota and the United States.

As noted above, N.D.C.C. § 49-21-01.7(12) specifically empowers the Commission to designate ETCs under sections 214 and 254 of the federal act. Furthermore, N.D.C.C. § 49-21-01.7(13) expressly gives the Commission the power to designate geographic service areas . . . under the federal act: These delegations of power from the Legislature necessarily includes the power to redefine a rural company's "service area" to something less than the company's "study area" as permitted under 47 U.S.C. § 214(e)(5) and 47 C.F.R.§ 54.207. If N.D.C.C. § 49-21-01.8 were construed to restrict an ETC designation to only a study area basis, and without the opportunity for an applicant to seek to redefine the service area requirement consistent with section 214(e)(5), the state law would have the effect of denying the applicant rights that have been conferred by federal law and would render the delegation of power to the Commission meaningless.

Another consideration is that a state law provision that would be construed to limit a federal ETC to providing the supported services throughout a rural telephone company's "study area" would likely be preempted under both 47 U.S.C. § 254(f) and 47 U.S.C. § 253(a). Section 254(f) limits a state's authority to adopting "regulations not inconsistent with the [FCC's] rules to preserve and advance universal service." Restricting ETC designations under state law to only a study area basis would be inconsistent and directly in conflict with both 47 U.S.C. § 214(e)(5) and 47 C.F.R. § 54.207(b), which both expressly contemplate and permit the redefinition of the service area requirement for purposes of federal ETC designations. Also, 47 U.S.C. § 253(a) provides that no state statute or regulation may prohibit or have the effect of prohibiting the ability of any entity to provide interstate telecommunications service. A state law that would be construed to deny designation of federal ETC status based on a study area requirement could essentially prohibit the Partnerships' ability to provide the supported services.

The Commission finds that the proper focus of N.D.C.C. § 49-21-08.1 is that an ETC is required to offer all services supported by federal universal service mechanisms throughout the applicable area in which it has been granted ETC status. This requirement makes the state statute consistent with the obligation of an ETC under 47 U.S.C. § 214(e)(1) of the federal act.

The Commission's action to redefine the service area requirement as requested by the Partnerships is necessary to facilitate the granting of the federal ETC to the Partnerships in the areas of the rural telephone companies' service areas that fall within Verizon Wireless' CMRS licensed areas.

Joint Stipulation

The RTCG members have withdrawn their opposition in these proceedings. The February 6, 2004 Joint Stipulation states that, based on the Commission's decision granting ETC status to Western Wireless in Case No. PU-1564-98-428, the RTCG does not contest the designation of the Partnerships as a federal ETC in those areas where the Partnerships serve the entire study area. The parties stipulate that the Commission may issue Orders in each of the captioned dockets to grant conditional ETC designation in rural service areas where the Partnerships redefine the service area requirement for purposes of ETC designation, subject to the FCC approval of the redefined service area requirement under 47 C.F.R. § 54.207(c). The parties stipulate that redefining the rural service areas for the purposes of the Partnerships universal service support shall not be construed as an agreement to redefine the study areas for purposes of RTCG members universal service support nor construed to constitute a waiver of the RTCG's rights to object to or contest any future ETC applications.

#### Conclusion

Based on the evidence in this proceeding, each applicant is qualified under the Telecommunications Act of 1996, Section 214(e) for designation as an ETC eligible to receive federal universal service funding and it is in the public interest the Partnerships each be designated as an ETC in the requested designated service areas.

#### Order

The Commission orders:

- 1. Northwest Dakota Cellular of North Dakota Limited Partnership is designated an eligible telecommunications carrier for the purpose of receiving federal universal service support in the service area requested as follows: (a) is designated in those study areas not requiring redefinition and, (b) in those study areas where redefinition is required under 47 C.F.R. § 54.207(c), is designated conditioned upon FCC approval.
- 2. North Central RSA 2 of North Dakota Limited Partnership is designated an eligible telecommunications carrier for the purpose of receiving federal universal service support in the service area requested conditioned upon FCC approval under 47 C.F.R. § 54.207(c) of the requested redefined study areas.
- 3. North Dakota RSA No. 3 Limited Partnership is designated an eligible telecommunications carrier for the purpose of receiving federal universal service support in the service area requested as follows: (a) is designated in those study areas not requiring redefinition and, (b) in those study areas where redefinition is required under 47 C.F.R. § 54.207(c), is designated conditioned upon FCC approval.
- 4. Badlands Cellular of North Dakota Limited Partnership is designated an eligible telecommunications carrier for the purpose of receiving federal universal service support in the service area requested as follows: (a) is designated in those study areas not requiring redefinition and, (b) in those study areas where redefinition is required under 47 C.F.R. § 54.207(c), is designated conditioned upon FCC approval.

- 5. North Dakota 5 Kidder Limited Partnership is designated an eligible telecommunications carrier for the purpose of receiving federal universal service support in the service area requested as follows: (a) is designated in those study areas not requiring redefinition and, (b) in those study areas where redefinition is required under 47 C.F.R. § 54.207(c), is designated conditioned upon FCC approval.
- 6. Bismarck MSA Limited Partnership is designated an eligible telecommunications carrier for the purpose of receiving federal universal service support in the service area requested as follows: (a) is designated in those study areas not requiring redefinition and, (b) in those study areas where redefinition is required under 47 C.F.R. § 54.207(c), is designated conditioned upon FCC approval.
- 7. Each of the applicants is designated as an eligible telecommunications carrier for the purpose of receiving federal universal service support in the designated service areas conditioned upon the filing of a tariff for its universal service, Lifeline, and Link-Up offerings.
- Each of the applicants shall file quarterly reports to the Commission describing the status of its wireless E-911 implementation in North Dakota.

#### **PUBLIC SERVICE COMMISSION**

Susan E. Wefald	Tony Clark	Kevin Cramer
Commissioner	President	Commissioner

# BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of

RCC MINNESOTA, INC., d/b/a CELLULAR ONE

For Designation as an Eligible Telecommunications Carrier

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DOCKET NO. UT-023033

ORDER GRANTING PETITION FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER

#### I. INTRODUCTION

The Telecommunications Act of 1996 (Act)<sup>1</sup> requires state utility commissions to make a number of decisions related to opening local telecommunications markets to competition and preserving and advancing universal service. One of those decisions is the designation of qualified common carriers as eligible telecommunications carriers (ETCs). In order to be eligible for federal universal service support, a common carrier must be designated by the state commission as an ETC. 47 U.S.C. § 214(e)(1). Once designated as an ETC, a carrier must advertise the availability of service and offer service in the geographic area in which it is designated. *Id.* 

The Commission considered the requests of numerous carriers for initial designation as ETCs at its regularly scheduled open meetings of November 26 and December 10, 1997. The Commission made its initial designations of ETCs by order dated December 23, 1997 (First Order Designating ETCs).<sup>2</sup>

The Act provides for the designation of multiple ETCs in any given service area. In areas that are served by rural telephone companies, state commissions may designate additional ETCs if such designation is in the public interest. 47 U.S.C. § 214(e)(2). Designation of ETCs in areas served by rural companies must be at the study-area

<sup>&</sup>lt;sup>1</sup> Public Law 104-104, 110 Stat, 154 (1996), codified in scattered sections of Title 47 U.S.C.

<sup>&</sup>lt;sup>2</sup> See In the Matter of the Petitions for Designation as Eligible Telecommunications Carriers, Docket Nos. UT-970333-970354; 970356, Order Designating Eligible Telecommunications Carriers (Dec. 23, 1997) (First Order Designating ETCs).

<sup>&</sup>lt;sup>3</sup> A "rural telephone company" is defined at 47 U.S.C. § 147(37).

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level,<sup>4</sup> unless the state commission and the Federal Communications Communication (FCC) agree to a different geographic service area. 47 U.S.C. § 214(e)(5). In all other areas, state commissions must designate additional ETCs upon request and such designation may be made for any geographic area established by the state commission. *Id*.

In our initial designations, we designated Verizon Northwest, Inc., as an ETC for each of its exchanges in Washington. We designated Qwest Corporation as an ETC for only ten exchanges because it did not request designation for every exchange it serves. The Commission designated United States Cellular Corporation as an ETC for nine geographic service areas, none of which were served by rural telephone companies.

In our First Order Designating ETCs, the Commission designated areas served by rural companies at the study-area level for one year, and by the more finely graded exchange-area level thereafter.<sup>5</sup> On August 17, 1998, the Commission, in conjunction with 20 rural companies, petitioned the FCC to agree with the exchange-level designations, rather than study-area designations, for rural companies. The FCC granted the petition on September 9, 1999.<sup>6</sup>

In making its initial designations, the Commission made only one designation for each geographic service area served by a rural telephone company. At that time, the issue of whether the designation of additional ETCs in rural areas would be in the public interest was not before the Commission. The Commission did find that ETC designations of both rural and non-rural companies were in the public interest.<sup>7</sup>

<sup>&</sup>lt;sup>4</sup> A "study area" is commonly known as an ILEC's existing service area and generally includes all of the exchanges in which the company provides service within the state. The study-area boundaries are fixed as of November 15, 1984. See In the Matter of Federal-State Joint Board on Universal Service, CC Docket 96-45, Report and Order, 12 FCC Rcd 8776, 8872 n.434 (1997).

<sup>&</sup>lt;sup>5</sup> First Order Designating ETCs, at 12.

<sup>&</sup>lt;sup>6</sup> In the Matter of Petition for Agreement with Designation of Rural Company Eligible Telecommunications Carrier Service Areas and for Approval of the Use of Disaggregation of Study Areas for the Purpose of Distributing Portable Federal Universal Service Support, CC Docket 96-45, Memorandum Opinion and Order, 15 FCC Rcd 9921 (1999). The petition also included a request for FCC approval of a method for deaveraging federal universal service support at the sub-wire center level.

<sup>&</sup>lt;sup>7</sup> See First Order Designating ETCs, at 17.

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On December 6, 1999, United States Cellular Corporation requested ETC designation in 70 exchanges served by rural incumbent local exchange companies (rural ILECs). Many of the rural ILECs opposed that request. The Commission found United States Cellular's request to be in the public interest and otherwise consistent with 47 U.S.C. § 214(e) and designated it as an ETC in those exchanges.<sup>8</sup> The rural companies appealed that decision.<sup>9</sup>

On June 3, 2002, RCC requested ETC designation in the exchanges listed in Appendix A. These exchanges, and parts of exchanges, are served by rural carriers. The Commission considered RCC's petition for ETC designation at its regularly scheduled open public meeting on June 14, 2002.

## II. THE MERITS OF RCC's PETITION FOR ETC DESIGNATION

## A. Statutory Requirements

Pursuant to 47 U.S.C. § 214(e)(1), ETCs must offer the services supported by universal service dollars and advertise the availability of those services. In addition, where a carrier requests ETC designation in areas served by rural telephone companies, the designation must be in the public interest. 47 U.S.C. § 214(e)(2). RCC's request is governed by these provisions.

The Act does not define what state commissions must consider in determining whether an ETC designation in an area served by rural carriers is in the public interest. In weighing the public interest, the Commission is mindful of the stated purpose of the Act, which is to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new technologies." In addition, the Commission also will consider our state policies set forth at RCW 80.36.300. Consistent with the national and state policies, the Commission will consider the relative benefits and burdens that additional ETC designation may bring to consumers as a whole.

<sup>&</sup>lt;sup>8</sup> See In the Matter of the Petition of United States Cellular Corp., et al. for designation as Eligible Telecommunications Carriers, Docket No. UT-970345, Third Supplemental Order, at 359-60 (Jan 27, 2000).

<sup>&</sup>lt;sup>9</sup> See Washington Ind. Tel. Ass'n v. Washington Utils. & Transp. Comm'n, 110 Wn. App. 489, 41 P.3d 1212 (2002), petition for rev. filed, No. 72428-8 (April 4, 2002).

#### B. Positions of Interested Persons

#### 1. RCC

- RCC is a predominately rural carrier and provides service in the areas set forth in its petition for ETC designation. RCC stated that its request for ETC designation is in the public interest because the designation will support its efforts as a wireless carrier to serve rural areas and provide competitive alternatives to rural customers, and will facilitate the provision of advanced services in rural areas. In its petition, RCC quoted our order designating United States Cellular as an ETC in rural areas in support of its claim that designation of a wireless carrier as an ETC will provide the benefits of increased mobility and an increased level of service. RCC's Petition, at 11.
- RCC cited to a decision of the Arizona Commerce Commission holding that designating wireless carriers as ETCs will provide additional consumer choice and provide a potential solution to "health and safety risks associated with geographic isolation." *Id.* (citations omitted).
- RCC stated it will provide consumers with wider local calling areas, mobile communications, a variety of service offerings, high-quality service, and competitive rates. *Id. at 12*.
- RCC also states that in most rural areas wireless service is only a convenience at this time because universal service support is not available to fund infrastructure investment. However, with universal service support wireless companies can invest in the infrastructure necessary to become potential alternative to wireline service. *Id.* "Provision of high-cost support to RCC will begin to level the playing field with the incumbent LECs and make available for the first time a potential competitor for primary telephone service in remote areas of Washington." *Id. at 12-13*.

#### 2. Rural Local Exchange Companies

<sup>&</sup>lt;sup>10</sup> S. 652, 104th Cong. (1996).

The rural ILECs<sup>11</sup> opposed RCC's petition. They claim that RCC's designation as an ETC in the exchanges served by rural ILECs is not in the public interest. They argued that the information before the Commission is insufficient to find that designation is in the public interest, and that there must be an adjudicative proceeding to establish additional facts before the Commission can lawfully designate RCC as an ETC in the rural areas. Rural ILECs conceded that the recent decision in WITA v. WUTC<sup>12</sup> controlled the issue of a hearing with respect to the procedural issues raised at the time the Commission designated United States Cellular, but stated that it was the lack of factual information concerning RCC's services and capabilities that warranted a hearing before a decision by the Commission.

On the morning of our Open Meeting at which the matter was heard, the Washington Independent Telephone Association (WITA), on behalf of itself and its members, and several rural companies, filed a response to RCC's petition. Their arguments are summarized below.

(a) The Rural ILECs argue that RCC's Petition Does Not Meet the Requirements of Section 214(e)(2)

The rural ILECs argued that RCC's petition does not meet the requirements of 47 U.S.C. § 214(e)(2) because it contains only a "vague assertion" that it is capable of serving the geographic area for which the designation is sought. Rural ILECs also contend that the affidavit of RCC's Legal Services Director concerning its ability and willingness to serve as an ETC is the very definition of a vague assertion. See Petition, Exhibit D. In support of this argument, the rural ILECs cite to the following FCC Declaratory Ruling concerning designation of wireless carriers as ETCs:

We [FCC] caution that a demonstration of the capability and commitment to provide service must encompass something more than a vague assertion of intent on the part of a carrier to provide service. The carrier must reasonably demonstrate to the state commission its ability

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<sup>&</sup>lt;sup>11</sup> As used in this Order, "rural ILECs" means members of the Washington Independent Telephone Association (WITA) and Asotin Telephone Company, CenturyTel of Washington, Inland Telephone Company, Pend Oreille Telephone company, Pioneer Telephone company, and St. John Cooperative Telephone and Telegraph Company.

<sup>12</sup> See supra n.9.

and willingness to provide service upon designation.<sup>13</sup>

- (b) The Rural ILECs argue that the public interest requirement of the Act requires a factually specific showing of RCC's actual ability to provide service.
- The rural ILECs contend that the Petition must be accompanied by factual information such as cell sites, capacities, transmitter power, or tower locations. In support of this contention they cited WWC Holding Co. v. Public Service Commission of Utah, <sup>14</sup> in which the Utah Supreme Court had decided that the map provided to the public service commission was insufficient to demonstrate the technical and objective data required to meet the public interest requirement of 47 U.S.C. § 214(e)(2). The rural ILECs argue that the map RCC provided with its petition is insufficient to provide the objective evidence to support RCC's claim that it will use the funds for the purpose for which the support is intended because there is no evidence of cell sites, capacities, transmitter power, or tower locations. See Petition, Exhibit A.
- The rural ILECs provided several color-coded maps, which purported to show RCC's signal strength in many areas of their exchanges. They also presented similar maps purporting to show locations where efforts to make cellular calls were successful or unsuccessful. The rural ILECs contend the maps show that RCC's coverage is spotty, at best, in several rural exchanges.
- At the Open Meeting, a representative of the rural ILECs described at some length the tests of RCC's signal strength in various rural ILEC exchanges undertaken by an employee of Inland Cellular Telephone Company, an affiliate of rural ILEC Inland Telephone Company. The rural ILECs contended that the tests demonstrate that RCC does not have sufficient signal strength in many locations to provide service throughout the area where it requests designation.
- In general, the rural ILECs characterized RCC's signal strength as sufficient or better along most highways and significant roads, such as roads that pass through small towns. Also, the rural ILECs generally characterized RCC's signal as marginal or insufficient as testing moved away from highways and main roads. The rural ILECs

<sup>&</sup>lt;sup>13</sup> In the Matter of Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling, CC Docket No. 96-45, 15 FCC Rcd 15,168, 15,178, ¶ 24 (2000) (Declaratory Ruling).

<sup>&</sup>lt;sup>14</sup> WWC Holding Co. v. Public Serv. Comm' of Utah, 44 P.3d 714 (Utah 2002).

contend that their tests conducted at homes with wireline service located away from towns, highways, and main roads show that RCC's signal was insufficient or non-existent in many instances.

- The rural ILECs compared their findings regarding RCC's signal strength to Pioneer Telephone Company's 100 percent penetration to occupied buildings. The rural ILECs argued that wireless service is not basic service used to connect customers to the public switched telephone network, but characterized it as "an adjunct service, used primarily while traveling." Declaration of Mike Richmond at 3.
  - (c) The Rural ILECs argue that RCC's Petition does not provide specific, objective evidence of its ability to provide the nine required services.
- The rural ILECs argue that the information provided by RCC about its ability to provide the nine required services was so scant that it is impossible to determine that it provides these services. They argue that RCC's service is not in the public interest because it does not satisfy the local usage requirement of 47 C.F.R. § 54.101(a). They also argue that ETC designation is not in the public interest because RCC provides "dial around" access to interexchange services, rather than "traditional" direct access, and thereby does not provide equal access to interexchange services.
- The rural ILECs challenge RCC's claim that it has satisfied the local usage requirement of 47 C.F.R. § 54.101(a) by stating that it will "comply with any and all minimum local usage requirements adopted by the FCC." The rural ILECs argue this is an insufficient showing and that RCC must provide information about its local usage plans. Rural ILEC Response to Petition, at 8-9.
- Rural ILECs compare RCC's statement to what the FCC had before it when Western Wireless applied to the FCC for ETC status in Wyoming. According to the rural ILECs, Western Wireless had provided evidence that it would offer service with a

<sup>&</sup>lt;sup>15</sup> Penetration rate is a telecommunications term that originally indicated the percentage of customers that have wire connections to the public switched telephone network. The term is sometimes applied to wireless and other communications technology.

<sup>&</sup>lt;sup>16</sup> The nine services required under 47 C.F.R. § 54.101 are (1) Voice grade access to the public switched network; (2) Local usage; (3) Dual tone multi-frequency signaling or its functional equivalent; (4) Single-party service or its functional equivalent; (5) Access to emergency services; (6) Access to operator services; (7) Access to interexchange service; (8) Access to directory service; and (9) Toll limitation for qualifying low-income consumers.

rate plan that included unlimited usage at a price of \$14.99 per month. Similarly, the rural ILECs cited a Minnesota Commission decision requiring a wireless ETC seeking designation in areas served by rural incumbents to offer a flat-rate plan that did not exceed 110% of the rural ILEC rate for the area to be served.

- The rural ILECs argue the Commission is "duty bound" to consider whether RCC's local usage plans are in the public interest. *Id. at 10*. They state it is impossible for the Commission to do so in the absence of information from RCC. This absence of information demonstrates "RCC's Petition is objectively inadequate to demonstrate that it has satisfied the requirements of Section 214(e)(1)." *Id*.
  - (d) The Rural ILECs argue that RCC's claim that ETC designation will serve the public interest through the introduction of advanced services is unsupported and irrelevant.
- The rural ILECs dispute RCC's statement that its designation as an ETC will lead to introduction of advanced services. They argue that this contention is unsupported and irrelevant to a decision concerning ETC designation. See Rural ILEC Response to Petition, at 11-12. The rural ILECs state RCC does not define what the advanced services are or will be, and that it is nothing more than an unsubstantiated claim that may be intended to bolster the weakness of RCC's petition with respect to the nine requirements.
  - (e) The Rural ILECs Argue that promotion of competition alone is not sufficient to warrant a finding that RCC's request for ETC designation is in the public interest.
- The rural ILECs argue that the Commission may not rely on a policy preference for competition to determine the public interest, and that the Commission must consider other factors. See Rural ILEC Response to Petition, at 16-17. They also argue that if competition alone were sufficient to support a finding in the public interest, then there would be no finding to make because every additional ETC would be in the public interest and a separate finding would be meaningless. Id. at 17. They argue that the Commission must examine the facts beyond the mere assertion that designating RCC will further competition. Id.
- The rural ILECs contend the Commission must evaluate whether RCC has the actual ability to serve rural areas and that individual, existing ETCs in rural areas also will be able to compete. *Id. at 18*. They argue that the substitution of one competitor for another does nothing to increase competition. *Id.* An increase in the number of

competitors might not increase competition; it might have the effect of simply replacing one well-established, productive competitor with one less prepared to serve the rural public. Id. at 19.

30 Rural ILECs noted that the United States Circuit Court for the District of Columbia, rejected the notion of "competition for competition's sake." Id. In United States Telecom Ass'n v. Federal Communications Comm'n, 17 the Court reviewed the FCC's efforts to promote competition through unbundling of non-rural ILECs' network elements for use by competitive local exchange companies. Rural ILEC's argue that the Court found that the FCC's policy would actually harm competition in the long run by undermining the ability of non-rural ILECs to compete with competitors in certain instances. Rural ILECs' Response to Petition, at 20.

Rural ILECs state that they do not argue that competition is an illegitimate aim of the Act, but rather that adding competitors to the market does not always equate to greater competition. They argue this is particularly true of RCC, which they say has failed to provide any objective evidence worthy of allowing it to tap into the federal universal service fund. Id.

The rural ILECs fault RCC for noting that competitive carriers in other states have earmarked funds for additional channel capacity, new cell sites, and expedited upgrading of facilities from analog to digital, while not committing itself to these or other similar activities. Id.

> The Commission should make a factual determination concerning how (f) designation of RCC will affect each, individual existing ETC.

The rural ILECs argue that the Commission must consider the facts and circumstances surrounding the six existing ETCs in the areas served by RCC before granting ETC designation to an additional carrier. Id. at 23. What may further the ends of competition in one area, they contend, may eliminate the existing ETC in another area. They argue that the public interest cannot be determined without considering how ETC designation would affect the existing ETCs. Finally, they state RCC made no effort to demonstrate how its designation as an ETC will affect the existing, individual rural ILECs. Id. at 24.

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<sup>&</sup>lt;sup>17</sup> United States Telecom Ass'n v. Federal Communications Comm'n, 290 F.3d 415 (D.C. Cir. 2002).

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(g) RCC has not shown that service provided by existing ETCs is deficient.

The rural ILECs contend RCC has not shown that service by existing ETCs is deficient. They cite to several declarations for the proposition that existing rural ILEC ETCs serve a very high percentage of the population, perhaps even 100% in some instances. They further contend that mobile wireless service is not used to provide basic service, but rather it is used in addition to wireline service to homes. *Id. at 22*.

The rural ILECs state that the federal universal service fund is not a bottomless reservoir of money. While "current rules do not decrease support for one ETC if an additional ETC is added, at some point the effect will be to force a cap on or restructuring of the USF." *Id.* The rural ILECs contend that the Commission must make a full determination of RCC's capabilities to actually add value through "legitimate" competition. *Id. at 23*.

#### 3. Commission Staff

Commission Staff recommended approval of RCC's request for designation as an ETC. Staff's recommendation was based in part on consistency with our designation of United States Cellular Corporation as an ETC in 1999. See Third Supplemental Order in Docket No. UT-970345. In that order, we stated that wireless service will provide: increased mobility for those that choose it; increased service; access to electronic mail over wireless telephones; an increase in the likelihood that cellular technology will become available to more rural customers at an affordable price; access to the Internet over wireless telephones; and a choice between the reliability of wireline service and the mobility of wireless service. Staff indicated that approving RCC's request for ETC designation is consistent with the purposes of the Act, promotion of competition, and preservation and advancement of universal service. Staff Open Meeting Memo at 5.

In addition, Staff stated that ETC designation would not only bring competition to areas served by rural ILECs and RCC, but would bring the *benefits* of competition. The benefits of competition, according to Staff, are downward pressure on prices, introduction of new products, and emphasis on customer service.

Staff explained that RCC already competes with rural ILECs, but it does not do so on an equal basis. Rural ILECs have access to both federal and state universal service

funds. ETC designation will result in access to federal universal service funds for RCC, but not state universal service funds. <sup>18</sup>

Staff also explained why access to federal universal service support funds is important to RCC. RCC faces the same low-revenue circumstances that rural ILECs face. <sup>19</sup> If RCC is to provide service in rural areas, then it must have sufficient support to do so. Customers will see the benefits of competition only if competitors have sufficient support.

Staff also noted that the FCC has changed its rules for distribution of federal universal service support since the Commission designated United States Cellular Corporation as an ETC in 1999. At that time, FCC rules treated federal universal service support as a "zero sum game," whereby a competitor's successful gain of a customer reduced the amount of support available to the incumbent. However, in 2000, the FCC altered its rules to permit all ETCs to collect support for every line served, with the amount per line based on the incumbent's support per line. *Id. at 3*.

Staff also recommend that the Commission grant RCC designation as an ETC for parts of exchanges where it is licensed to serve. In the past, there were concerns about cream-skimming, but the FCC's new support mechanism as well as rural incumbent filings in the federal universal service disaggregation docket indicate that cream-skimming is no longer a concern. *Id.* 

Finally, in response to a question concerning the territory served by RCC, Staff responded that the area served by RCC -- its three cellular geographic service areas (CGSAs) -- are available on the FCC website and that anyone can determine where it is licensed to serve.

#### IV. COMMISSION DISCUSSION

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<sup>&</sup>lt;sup>18</sup> State universal service support is provided to rural ILECs through rates permitted on a service known as terminating access. FCC rules prohibit wireless carriers from filing tariffs to collect terminating access. 47 C.F.R. § 20.15(c).

<sup>&</sup>lt;sup>19</sup> Federal and state universal service support at issue here is generally referred to as "high-cost" support. In some locations, particularly mountainous areas, the cost of construction may be higher than average. However, not all "high-cost" service is provided in locations where construction costs are above average. More accurate descriptions would be "high-cost per customer" support or "low–revenue" support because companies that receive this support are expected to serve locations where there are very few customers to bear the cost of the necessary facilities. For example, the Commission has provided state support to the company that serves the Palouse exchange because it has determined that it costs an average of \$71.67 per-line, per-month to provide service when the price is \$18.00 per month. The Palouse exchange is not difficult terrain in which to construct facilities, it is merely characterized by a small number of customers.

## A. RCC's Petition Meets the Requirements of Section 214(e)(2).

- We believe that RCC's petition satisfies the requirements of 47 U.S.C. § 214(e)(2). We disagree with the rural ILECs that RCC's petition contained only a "vague assertion" of its willingness and ability to serve the geographic area for which it requests ETC designation. We disagree with the rural ILECs that the FCC's Declaratory Order supports rejecting RCC's request.
- In support of their argument, the rural ILECs quote only a portion of the relevant paragraph of the FCC's order. When read in its entirety, the paragraph supports RCC's request for ETC designation:

A new entrant can make a reasonable demonstration to the state commission of its capability and commitment to provide universal service without-the actual provision of the proposed service. There are several possible methods for doing so, including, but not limited to: (1) a description of the proposed service technology, as supported by appropriate submissions; (2) a demonstration of the extent to which the carrier may otherwise be providing telecommunications services within the state; (3) a description of the extent to which the carrier has entered into interconnection and resale agreements; or, (4) a sworn affidavit signed by a representative of the carrier to ensure compliance with the obligation to offer and advertise the supported services. We caution that a demonstration of the capability and commitment to provide service must encompass something more than a vague assertion of intent on the part of a carrier to provide service. The carrier must reasonably demonstrate to the state commission its ability and willingness to provide service upon designation.

Declaratory Ruling, ¶ 24 (footnotes omitted).

RCC Minnesota does business as Cellular One in Washington and described its proposed service and technology in its petition. The director of legal services for the company appeared before the Commission and described RCC as provider of cellular service in 14 states, holding 36 licenses from the FCC, 33 of which are for rural service areas. *Open Meeting Transcript, at 25*. It acquired the three Washington licenses in 2000 and continued service under the name Cellular One. Since that time

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it has examined the markets and determined that it can improve service with federal universal service support. *Id*.

- 46 RCC is licensed by the FCC to provide service. As Staff informed us at the Open Meeting, there is substantial information on the FCC website concerning the licenses and service areas of RCC. *Id. at 42*.
- In 1997, the rural ILECs submitted their requests for ETC designation, which were no more specific than the petition submitted by RCC. See Docket Nos. UT-970333,-54 and UT-970356. Just as we are familiar with the companies we designated in 1997, we are familiar with Cellular One as a service provider in Washington. We have sufficient information from RCC's petition and its appearance at our Open Meeting to conclude, and we do conclude, that RCC has the capability and the lawful authority to provide telecommunications services as an ETC just as it has provided service for many years without such designation.

## B. RCC Has Demonstrated Its Ability to Serve

- In response to the rural ILECs' allegations that RCC does not have sufficient signal strength to provide basic service in all areas of the rural exchanges, RCC states that this varied signal strength is precisely why it needs federal universal service support. It stated that rural ILECs have had decades of support that have enabled them to build plant and equipment to provide extensive service within their exchanges. RCC stated that the issue before the Commission is whether it wants cellular coverage in these areas sooner rather than later, in the next few years or in 2020.
- We are persuaded by RCC's argument. We are further persuaded by the FCC's policy statement that a carrier requesting ETC designation need not provide service throughout an area to qualify as an ETC.

We find that an interpretation of 47 U.S.C. § 214(e) that would require carriers to provide the supported services throughout the service area prior to designation as an ETC has the effect of prohibiting the ability of prospective entrants from providing telecommunications service. A new entrant faces a substantial barrier to entry if the incumbent local exchange carrier is receiving universal service support that is not available to the new entrant for serving customers in high-cost areas. We believe that requiring a prospective new entrant to provide service throughout a service area before receiving ETC status has the effect of

prohibiting competitive entry in those areas where universal service support is essential to the provision of affordable telecommunications service and is available to the incumbent carrier. Such a requirement would deprive consumers in high-cost areas of the benefits of competition by insulating the incumbent LEC from competition.

Declaratory Ruling, ¶ 12 (footnotes omitted).

We conclude that a decision denying ETC designation to RCC based on its lack of signal strength in some locations would have the effect of prohibiting it from providing telecommunications service in those areas, which would deprive consumers in high-cost areas the benefits of competition by insulating rural ILECs from competition.<sup>20</sup>

# C. RCC Has Provided Evidence of its Ability to Provide the Nine Required Services.

The FCC requires a carrier to offer nine services upon designation as an ETC. <sup>21</sup> The rural ILECs focus on two of them. They argue that RCC has not provided evidence that it provides sufficient local usage<sup>22</sup> to meet the federal standard or that it provides the required access to interexchange service. <sup>23</sup> ("Local usage" is an FCC requirement that a customer must receive some amount of local use of the public switched telephone network, not just access to it, for the monthly amount paid for service.) RCC states in its petition that it will comply with any applicable FCC requirement concerning local usage should that agency establish one. RCC states that it has interconnection agreements with interexchange carriers and that customers may "dial around" to reach interexchange services. <sup>24</sup>

The FCC has left to the states the decision of how much local service a carrier must provide in exchange for a monthly payment in order to meet the local usage requirement set forth in 47 C.F.R. § 54.101(a)(2). Wireline companies in Washington

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 $<sup>^{20}</sup>$  See In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (May 8, 1997) ("First Report and Order")  $\P$  136, n.329 and  $\P$  141.

<sup>&</sup>lt;sup>21</sup> See supra n.16.

<sup>&</sup>lt;sup>22</sup> See First Report and Order, ¶ 65.

<sup>&</sup>lt;sup>23</sup> Interexchange service is commonly referred to as long-distance service.

<sup>&</sup>lt;sup>24</sup> Dial around services are, for example, 1-800-CALLATT and 10-10-321.

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are required to offer flat-rate service. RCW 80.04.130(3). Wireless companies generally provide a quantity of minutes each month that varies with price, and charge additional amounts per-minute if a customer exceeds the allotment.

Price is an essential element of competition. Customers will choose to take service from RCC if the price is right, and will not do so if it is too high. If no customers choose its services, then RCC will not receive federal universal service support. We have declined to make a determination of a particular amount of local usage that is acceptable. Customers can choose for themselves if the amount of local usage is worth the price.

We are aware that some states have required wireless carriers to offer service at commission-determined prices. We decline to adopt this approach at this time. Since our designation of United States Cellular as an ETC in 1999, we have not had a complaint from customers or companies that it is not providing sufficient local usage.

Rural ILECs state that RCC does not identify the interexchange carriers that customers may choose, nor does it provide "equal access" to interexchange service. However, RCC is required to provide access to interexchange services and it does so. That is sufficient to meet the requirement in 47 C.F.R. § 54.101(a). It is not required to provide access to the interexchange company of the customer's choice. 47 U.S.C. § 332(c)(8).<sup>25</sup> Quite recently the Federal-State Joint Board on Universal Service declined to recommend that equal access be added as a tenth requirement for ETC designation.<sup>26</sup> We note that wireless companies often offer long distance service as a part of their service packages. This provides a choice to customers in comparison to wireline carriers, and we trust that customers are able to make their own choices.

We conclude that RCC provides local usage and access to interexchange service sufficient to meet FCC requirements. It is not in the public interest to require more of RCC than Congress or the FCC require of wireless ETCs.

#### D. Availability of Advanced Services.

In 1999, rural ILECs argued that advanced services, including greater bandwidth for data transmission, are more likely to be provided over wireline service. *Third Supp.* 

<sup>&</sup>lt;sup>25</sup> See also, First Report and Order, ¶ 78.

<sup>&</sup>lt;sup>26</sup> In the matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Recommended Decision (July 10, 2002).

Order, ¶ 48. RCC states in its Petition that its designation will lead to introduction of advanced services, a claim that rural ILECS consider unsubstantiated.

The FCC does not require carriers to provided advanced services in order to be designated as an ETC. Rural ILECs are correct that RCC's ability, substantiated or not, is irrelevant to this decision. We note only that the ETC offering advanced services may be the one most likely chosen by customers who desire those services.

## E. Advancement of Competition Is a Factor In Determining the Public Interest.

Competition alone may not be sufficient to meet the public interest test, but the benefits of competition are more than sufficient. Staff articulated these benefits well: downward pressure on prices, increased innovation, and more attention to customer service.

Urban customers can choose among many companies and technologies because companies serving in urban areas can earn sufficient revenue to pay for necessary investment. Rural ILECs receive support because they serve few customers and, in some cases, those customer are located in mountainous or otherwise difficult terrain. State and federal policies support all lines provided by rural ILECs to customers. Even multi-line businesses receive supported service. Because of the limited opportunities for revenue in areas served by rural ILECs, there will be no competition—and no customer choice—without multiple ETCs.

As explained in Paragraph 30, the rural ILECs argue that *United States Telecom Ass'n v. Federal Communications Comm'n* supports their argument that competition alone is insufficient to satisfy the public interest. The holding in that case does not support the rural ILECs' argument. That case was concerned, in part, with the FCC's national list of unbundled network elements incumbents must make available to customers. The court found that the FCC's rationale for the rule did not adequately consider whether the ability of competitors to provide service without such access would be impaired, and that the FCC rested too heavily on the notion that access to more elements would benefit competition. *See 47 U.S.C. § 251(d)(2)*. However, ETC designation is not a question of a competitor's access to an incumbent's network. Rather, it is a question of what carriers are eligible to receive federal universal service support. Unlike access to unbundled network elements, Congress did not impose a "necessary and impair" standard upon access to support.

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# F. A factual determination of how designation of RCC will affect each rural ILEC is unnecessary.

Universal service is intended to benefit customers, not companies.<sup>27</sup> The public interest is not determined by what is best for a single company, be it a rural ILEC or RCC. We have determined, as has the FCC, that support should be provided for all lines in low-revenue locations, in order to ensure that basic telecommunications is available to all customers. There is no reason to distinguish among technologies when customers can do that for themselves. Rural ILECs receive support based on costs; if costs remain steady, rural ILECs will receive support even if customers choose RCC over rural ILEC services. Our considerable experience with these matters is more than sufficient for us to understand the implications of our decision and to understand that the effect generally will be the same throughout the area served by RCC.<sup>28</sup> Customers may choose to take service from RCC, retain the services of the rural incumbent, or take service from both.

## G. RCC Need Not Show that Existing ETC is deficient.

Rural ILECs contend RCC has not shown that service by existing ETCs is deficient. Rural ILECs contend that mobile wireless service is not used to provide basic service. Rather, it is used in addition to landline service to homes and businesses. They express concern that while current FCC rules do not decrease support for one ETC if an additional ETC is added, at some point the effect will be to force a cap on or restructuring of the federal universal service fund. Rural ILECs insist that we must determine through a full evidentiary process, a process that might typically take up to twelve months, that RCC's capabilities add value through "legitimate" competition.

Neither the Act nor FCC rules require us to determine that the service of one ETC is deficient before a state commission may designate an additional ETC. The standard is whether the designation of additional ETCs in rural areas is in the public interest,

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<sup>&</sup>lt;sup>27</sup> Washington Ind. Tel. Ass'n, 110 Wn.App. at 510 (citing Alenco Communications Inc. v. Federal Communications Comm'n, 201 F.3d 608, 621 (5th Cir. 2000)).

<sup>&</sup>lt;sup>28</sup> See Docket No. UT-970380, Staff Investigation into Deaveraged Universal Service Cost Support; UT-970345, Petition of united States Cellular Corp. for Designation as an Eligible Telecommunications Carrier; UT-980311 Universal Service Fund Issues; UT-013047, State Certification Under 47 U.S.C. 254(e) for Federal Universal Service Funds; UT-013058, Disaggregation & Targeting of Federal Universal Service Support Pursuant to 47 CFR 54.315 and FCC Order 01-157; UT-023020, Joint Petition of CenturyTel of Washington, Inc., and CenturyTel of Inter Island, Inc., for Approval of USF Disaggregation Plan; UT-023031, Non-Rural and Price Cap Disaggregation & Targeting of Federal Universal Service Support.

which is not synonymous with the best interest of the current ETCs, or with a need to find the existing ETC deficient.

The FCC has determined that mobile wireless service qualifies as basic service.<sup>29</sup> We do not believe we should constrain rural citizens to communication only from their homes.<sup>30</sup> Indeed, wireless phones can be critically important for citizens who live and work in rural areas, where a road-side accident or a mishap on a farm can occur far from the nearest landline phone.

Rural ILECs are correct that current FCC rules do not decrease support for one ETC if an additional ETC is added. We take the FCC rules as we find them, and that includes its determination (with which we agree) that support should be provided for all lines, regardless of which carrier provides them or the technology used to provide the service. Concern about a cap or restructuring of the federal universal service fund is speculative at best.<sup>31</sup>

By referring to "legitimate" competition, the rural ILECs suggest that there is "illegitimate" competition that could result from our designation of RCC as an ETC. Even if we agreed with the rural ILECs' notion of illegitimate competition, we do not agree that RCC's service would result in illegitimate competition. RCC competes with the rural ILECs now, and we find nothing unlawful or inappropriate about its service. While ETC designation may improve RCC's ability to compete with the rural ILECs, it will not change the nature of that competition.

#### H. Conclusion

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Granting ETC designation to RCC is in the public interest. It will facilitate the telecommunications choices available to rural citizens, support the growth of new technologies and services, preserve and advance universal service, and promote competition and the benefits it brings.

<sup>&</sup>lt;sup>29</sup> First Report and Order, ¶¶ 47-49.

<sup>&</sup>lt;sup>30</sup> The FCC has very recently affirmed that mobile service can be basic service. See In the Matter of Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering provided by Western Wireless in Kansas is Subject to Regulation as a Local Exchange Service, WT-Docket No. 00-239, Memorandum Opinion and Order, (August 2, 2002).

 $<sup>^{31}</sup>$  The FCC has addressed the false choice between universal service and competition. First Report and Order, ¶ 50.

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We bring to this decision the knowledge and experience that we bring to every decision, whether it be in an open meeting or in an adjudication. RCC's petition is procedurally sufficient and RCC meets the qualifications for ETC designation. Because RCC meets the requirements for ETC designation, and because designation is in the public interest, we grant RCC's petition as modified by this Order.

#### **OTHER ISSUES**

We now address two remaining issues: petitioning the FCC for concurrence with our decision to grant ETC designation to RCC for parts of several exchanges, and production of electronic maps by RCC of its CGSAs. These are related because designation for parts of exchanges requires defining what geographic area is included, and production of electronic maps will assist in that task. In addition, production of electronic maps will assist RCC in claiming federal universal service funds to which it will become entitled, and those maps will also assist rural ILECs, the FCC (through the Universal Service Administration Company), and, if need be, this Commission, to determine the accuracy of requests for federal support that are based on customer location.

We understand FCC rules permit the Commission, a carrier, or both to petition for concurrence with ETC designations that are not based on study areas.<sup>32</sup> We believe RCC is in the better position to petition the FCC for concurrence with our designation for parts of exchange areas. We will order RCC to prepare and submit a petition consistent with this Order.

To petition for concurrence, RCC will have to prepare maps of its CGSAs. We have recently ordered rural ILECs to disaggregate federal universal service support and to prepare electronic maps as part of that activity.<sup>33</sup> Those maps will be filed with the Commission and will be available to RCC for use in preparation of its petition. We will order RCC to prepare maps with the same standards and attributes required of rural ILECs, and its maps must be filed with the Commission, where they will be available to rural ILECs.

73 The availability of electronic maps from rural ILECs and RCC will permit all interested persons to have an accurate representation of exchanges and service areas

<sup>&</sup>lt;sup>32</sup> First Report and order, ¶ 188. See also 47 U.S.C. § 214(e)(5).

<sup>&</sup>lt;sup>33</sup> See Final Order, Docket Nos. UT-013058 and UT-023020 (August 2, 2002).

for the purpose of ensuring accurate requests for, and payment of, federal universal service support.

#### VI. FINDINGS OF FACTS

- Having discussed above all matters material to our decision, and having stated general findings and conclusions, the Commission now makes the following summary findings of fact.
- 75 (1) RCC Minnesota (d/b/a Cellular One) is a telecommunications company doing business in the state of Washington.
- 76 (2) RCC currently provides service in all of the exchanges listed in Appendix A.
- 77 (3) RCC's petition satisfies the requirements of 47 U.S.C. § 214(e)(2).
- 78 (4) RCC offers all of the services that are to be supported by the federal universal service support mechanisms set forth in 47 C.F.R. § 54.101(a).
- 79 (5) RCC competes with rural ILECs and other telecommunications carriers in the exchanges where it serves.

#### VII. CONCLUSIONS OF LAW

- The Commission has jurisdiction over the subject matter of this petition and over RCC with respect to its designation as an ETC.
- The Commission is not required by the Act or by any provision of state law to hold an adjudicative proceeding or other hearing prior to designating a telecommunication carrier an ETC.
- 82 (3) Granting RCC's petition for designation as an ETC in the exchanges listed in Appendix A is consistent with the public interest, and is consistent with applicable state and federal law.

- Granting RCC's petition for designation as an ETC in areas served by rural telephone companies is in the public interest.
- 84 (5) Requiring RCC to create electronic maps of its cellular geographic service areas is in the public interest.
- The Commission has authority to modify, suspend, or revoke the designations granted in this order at a future date.

#### VII. ORDER

- This Order decides issues raised in a non-adjudicative proceeding. Based on the foregoing, the Commission orders:
- The petition of RCC Minnesota (d/b/a Cellular One) is granted, as modified by this Order. Each of the requested designations set forth in Appendix A is granted. For each exchange and partial exchange, there is a separate designation.
- 88 (2) RCC must provide Lifeline service consistent with 47 C.F.R. § 54.405.
- RCC must prepare electronic maps of its service cellular geographic service areas with standards and attributes as described in the Commission's Order in Docket No. UT-013058 and UT-023020, entered August 2, 2002.
- 90 (4) RCC must petition the FCC for concurrence in designation as an ETC for areas that are parts of ILEC exchanges.
- 91 (5) The Commission has authority to modify, suspend, or revoke these designations, including the service areas accompanying those designations, at a future date.

DATED at Olympia, Washington, and effective this 14<sup>th</sup> day of August, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

# APPENDIX A

# NON-RURAL LEC EXCHANGES

LEC: Verizon Northwest, Inc. - WA (Includes Contel Exchanges)

Exchanges:

Loomis

Lake Wenatchee

Molson

Stevens

Tonasket

Leavenworth

Curlew

Entiat

Republic

East Wenatchee (partial)

Newport Brewster Rosalia (partial) Tekoah

Bridgeport

Thornton

Manson Chelan Mansfield

Oakesdale Farmington Garfield

Waterville Cashmere

Palouse Pullman

Wenatchee

LEC: <u>QWEST Corp. – WA</u>

Exchanges:

Oroville

Deer Park (partial)

Northpoint (parital)

Colfax

Colville

Pomeroy

Omak

Clarkston (partial)

Pateros

Coulee Dam (partial) Dayton Waitsburg

Loon Lake

Walla Walla

Elk (partial)

Pasco (partial)

Springdale (partial)

#### RURAL LEC EXCHANGES 1.1

LEC: CentruyTel of Washington, Inc.

Exchanges:

Kettle Falls

Inchelium

Valley

Coulee City (partial)

Winthrop Nespelem

Starbuck (partial) Davenport (partial)

Eureka (partial)

Chewelah

**Twisp** 

LEC: Pend Oreille Tel. Co.

Exchanges:

Cusick

Ione (partial)

Metaline Falls

LEC: ST. John Tel. Co.

Exchange:

Saint John (partial)

LEC: Pioneer Tel. Co.

Exchanges:

Lacrosse

**Endicott** 

LEC: Inland Tel. Co.

Exchanges:

Uniontown

Prescott (partial)

LEC: Asotin Tel. Co.

Exchanges:

Asotin

Anatone

LEC: M & L Enterprises d/b/a Skyline Tel. Co.

Exchange:

Mt. Hull

# BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of

AT&T Wireless PCS of Cleveland, LLC; AT&T Wireless Services of Washington, LLC; Spokane Cellular Telephone Company; Yakima Cellular Telephone Company; Bremerton Cellular Telephone Company; Olympia Cellular Telephone Company, Inc.; Bellingham Cellular Partnership and Hood River Cellular Telephone Company, Inc., d/b/a AT&T Wireless

For Designation as an Eligible Telecommunications Carrier

DOCKET NO. UT-043011

ORDER NO. 1

ORDER GRANTING PETITION FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER

Synopsis: The Commission grants the petition of AT&T Wireless for designation as an eligible telecommunications carrier. AT&T Wireless meets the requirements for designation, and granting the petition is in the public interest. AT&T Wireless is ordered to provide a map of its licensed service areas in electronic format.

#### I. INTRODUCTION

The Telecommunications Act of 1996 (federal Act or Act)<sup>1</sup> requires state utility commissions to make a number of decisions related to opening local telecommunications markets to competition and preserving and advancing universal service. One of those decisions is the designation of qualified common carriers as eligible telecommunications carriers (ETCs). In order to be

<sup>&</sup>lt;sup>1</sup> Public Law 104-104, 110 Stat. 56 (1996), codified in scattered sections of Title 47 U.S.C.

eligible for federal universal service support from the federal High Cost Fund (HCF), a common carrier must be designated by the state commission as an ETC. 47 U.S.C. § 214(e)(1). Once designated as an ETC, a carrier must advertise the availability of service and offer service in the geographic area in which it is designated. *Id*.

# II. THE MERITS OF AT&T WIRELESS'S PETITION FOR ETC DESIGNATION

#### A. The Petitioner

- On February 20, 2004, AT&T Wireless PCS of Cleveland, LLC; AT&T Wireless Services of Washington, LLC; Spokane Cellular Telephone Company; Yakima Cellular Telephone Company; Bremerton Cellular Telephone Company; Olympia Cellular Telephone Company, Inc.; Bellingham Cellular Partnership and Hood River Cellular Telephone Company, Inc., subsidiary licensees of AT&T Wireless Service, Inc. (collectively "AWS") petitioned for Designation as an ETC pursuant to 47 U.S.C. § 214(e)(2) and 47 C.F.R. § 54.201.
- AWS petitioned for designation for its licensed service areas that coincide with some or all of the exchange areas operated by wireline carriers Qwest, Verizon Northwest, Sprint-United Tel. NW-WA, Asotin Tel., CenturyTel of Washington, Inc., CenturyTel of Cowiche, Inc., Ellensburg Tel. Co., Hat Island Tel. Co., Hood Canal Tel. Co, Inc., Inland Tel. Co. WA, Kalama Tel. Co., Lewis River Tel. Co., d/b/a TDS Telecom, McDaniel Tel. Co., d/b/a TDS Telecom, Mashell Telecom, Inc., St. John Telephone and Telegraph, Tenino Tel. Co., Toledo Tel. Co., Inc., Western Wahkiakum County Tel. Co., Whidbey Tel. Co., and Yelm Tel. Co. AWS Petition, Exhibits B and C. AWS did not petition for designation in areas where it is licensed to serve only portions of exchanges. Id. ¶ 32.

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AWS serves in excess of one-half million customers in both urban and rural areas of Washington State. It serves more than 20,000,000 customers nationwide. *Id.* ¶ 3. AWS is headquartered in Redmond, Washington. For purposes of ETC designation, AWS represents that it is considered a common carrier under 47 C.F.R. § 20.9. *Id.* ¶ 5.

AWS provides wireless voice and data services over two separate, overlapping networks. One network uses time division multiple access (TDMA) for voice signal transmission, and the other uses general packet radio service (GPRS) for voice and data transmission. *Id.* ¶7. GPRS provides higher speeds for data transmission than does TDMA.

## B. Statutory Requirements

- ETCs are required to offer the services supported by the universal service fund (USF) and advertise the availability of those services. 47 U.S.C. § 214(e)(2); 47 C.F.R. § 101(a), (b). In addition, ETCs must offer discounts to low-income consumers through the Lifeline and Link Up programs. 47 C.F.R. §§ 54.405, 411.
- The federal Act authorizes state commissions to grant ETC designation to common carriers that request such designation, provided the carriers meet the requirements for ETC designation. The Act contemplates the designation of multiple ETCs in any given service area. 47 U.S.C. § 214(e). In an area served by a rural telephone company, state commissions may designate more than one ETC in the area if the state commission determines that such designation is in the public interest. 47 U.S.C. § 214(e)(2). The Act does not set forth the criteria state commissions must consider in determining whether the designation of an additional ETC in areas served by rural companies is in the public interest.

Designation of ETCs in areas served by rural companies must be at the studyarea level,<sup>2</sup> unless the state commission and the Federal Communications Communication (FCC) agree to a different geographic service area. 47 U.S.C. § 214(e)(5). AWS seeks designation in areas already served by non-rural and rural telephone companies, and by other wireless carriers and by wireless ETCs.

#### C. Positions of Interested Persons

#### 1. *AWS*

- AWS states that it provides the nine services ETCs must offer. AWS Petition, ¶ 15; see also 47 C.F.R. § 54.201. It explains in detail how it provides each service. AWS Petition, ¶ 16-24. AWS also describes its planned Lifeline offering. Id. ¶ 27.
- AWS states that many Washington residents live in rural areas where it is cost-prohibitive for a competitive telecommunications company to offer service, which means that these consumers lack the choice of service providers that is available to urban customers. *Id.* ¶ 29. AWS will use support from the federal HCF to expand its offerings in underserved areas, which will bring needed infrastructure and economic development to those areas in addition to customer choice. *Id.* ¶¶ 29-30.
- AWS cites orders of this Commission and the FCC that explain why the designation of additional ETCs in rural areas, particularly wireless ETCs, is in the public interest. *Id.* ¶¶ 34-40. The additional designations would serve the public interest by promoting consumer choice, innovation in services,

<sup>&</sup>lt;sup>2</sup> A "study area" is commonly known as an incumbent local exchange carrier's (ILEC's) existing service area and generally includes all of the exchanges in which the company provides service within the state. The study-area boundaries are fixed as of November 15, 1984. See In the Matter of Federal-State Joint Board on Universal Service, CC Docket 96-45, Report and Order, 12 FCC Rcd 8776, 8872 n.434 (1997) (First Report & Order).

availability of new technologies, increased mobility, and increased level of service. *Id.* 

- AWS contends that granting its petition for ETC designation is in the public interest because it will result in larger local calling areas compared to landline telephone companies, reduced long distance rates, competitive pricing, and the benefits of mobility. *Id.* ¶ 41. AWS also states it is in the public interest to designate it as an ETC because it will offer subscribers advanced services and technologies over its "state-of-the-art network facilities" which are used to provide supported services. *Id.* ¶¶ 42-43.
- AWS appeared at the Open Meeting and explained that it can be distinguished from other wireless ETCs in Washington because it offers nationwide calling plans that face competition from other large competitors. The other wireless ETCs in Washington are smaller carriers operating only in local or regional markets. AWS is different because it offers nationwide plans, which are priced to be competitive in urban areas. AWS also must remain competitive because its customers may take their telephone number to another carrier. This means that customers in rural areas will benefit from the downward pressure on prices caused by robust competition in the larger markets.

#### 2. Verizon Northwest Inc.

Verizon Northwest Inc. submitted written comments dated March 1, 2004.

Verizon Northwest expressed concern about the effect of designation of AWS on Verizon Northwest's share of interstate access support, but did not quantify that effect. Verizon Northwest recommends the Commission take no action on AWS's petition until the FCC decides how to address issues relating to multiple ETC designations.

# 3. Rural Incumbent Local Exchange Companies

- The Washington Independent Telephone Association, and its member companies (hereinafter "Rural ILECs") oppose AWS's petition. Rural ILECs submitted written comments and appeared at the March 10, 2004 Open Meeting through counsel.
- Rural ILECs request a formal adjudication pursuant to WAC 480-07-305. Rural ILEC Comments, at 1. Rural ILECs contend that AWS's petition lacks sufficient facts to make the public interest determination. Id. at 4. Specifically, they claim that AWS did not quantify the number of customers it serves in each rural exchange, which would be necessary in order for the Commission to determine the impact of designation on the federal HCF.—Rural ILECs also fault AWS for failing to include sufficient information for the Commission to weigh the unique advantages and disadvantages of AWS's service offerings, and for failing to submit "service plans." Id.
- Rural ILECs also state that the Commission should inquire into how many ETCs should be designated for high-cost, low-density service areas. They cite a recent recommended decision by the Federal-State Joint Board on Universal Service for the proposition that the Commission must specifically consider the number of ETCs that may be appropriate in any rural service area. *Id.* at 43. They contend that the Commission must determine whether there is public benefit to designating an additional wireless ETC in a rural area that already has at least one wireless ETC. *Id.*
- Rural ILECS state that there is a factual issue as to whether AWS's licenses cover entire counties. *Id.* They also contend that the Commission must determine if there are locations within AWS's licensed service area where AWS

<sup>&</sup>lt;sup>3</sup> Citing In the Matter of the Federal-State Joint Board on Universal Service, CC Docket 96-45, Recommended Decision, FCC 04J-1, ¶ 43 (rel. Feb. 27, 2004) (Recommended Decision).

does not provide service, and how AWS will satisfy its obligation to serve all of the designated service areas within a reasonable period of time. *Id.* 

- Rural ILECs contend that the FCC's decision in *Virginia Cellular*<sup>4</sup> is binding on the Commission. They state *Virginia Cellular* mandates this Commission to conduct an adjudication to weigh the benefits and costs of designation and that the petitioner bears the burden of proof that designation is in the public interest. *Id. at 3*.
- Rural ILECs also question whether AWS is capable of serving all the exchanges for which it seeks designation, and whether it can serve all parts of those exchanges. They note that AWS seeks designation for some exchanges, but not for other nearby exchanges in the same county. They cite AWS's request for ETC designation for the St. John exchange in Whitman County, but not the nearby Colfax exchange.
- Rural ILECs state that the FCC in *Virginia Cellular*, and other state commissions, have required carriers petitioning for ETC designation to commit to build a certain number of towers, or to introduce a particular service, and that AWS has not done so. Rural ILECs also state that AWS will receive support based on its designation even if it does not increase services or extend its ability to serve beyond its current ability.
- Rural ILECs also express concern that AWS may have limited the exchanges for which it requested designation to those where it will receive the most support or where conditions exist to make wireless service profitable even without support. Rural ILECs acknowledge that the disaggregation of federal support

<sup>&</sup>lt;sup>4</sup> In the Matter of Federal-State Joint Board on Universal Service Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier In the Commonwealth of Virginia, CC Docket 96-45, Memorandum Opinion and Order, FCC 03-338 (rel. Jan. 22, 2004).

reduces much of the potential for cream-skimming, but argued disaggregation alone cannot eliminate it completely.

# 4. Commission Staff

- Commission Staff recommends approval of the petition. Staff states that it would be in the public interest to grant AWS's petition for ETC designation because it will bring the benefits of competition to rural customers.
- 25 Staff states that granting the petition is consistent with the two purposes of the federal Act—to promote local competition and to preserve and advance universal service. Staff cites prior decisions in which this Commission has held that rural customers benefit from competition because additional customer choice will bring downward pressure on prices, greater availability of innovative products, and more attention to customer service. Staff Memorandum, at 3-4.
- Staff refers to this Commission's reliance on RCW 80.36.300 in prior ETC designations. This statute embodies the state policy to maintain and advance the efficiency and availability of telecommunications services, to ensure that customers pay reasonable rates for their services, and to promote diversity of supply of telecommunications services throughout the state. *Id. at 4.*<sup>5</sup>
- Staff also opine that granting the designation will further the principles of competitive and technological neutrality. Increasing the availability of

<sup>&</sup>lt;sup>5</sup> See In the Matter of the Petition of RCC Minnesota, Inc., d/b/a Cellular One For Designation as an Eligible Telecommunications Carrier, WUTC Docket No. UT-023033, Order Granting Petition for Designation as an Eligible Telecommunications Carrier, ¶ 10 (August 14, 2002) (RCC Order); In The Matter of The Petition of Inland Cellular Telephone Company, d/b/a Inland Cellular, Eastern Sub-RSA Limited Partnership, and Washington RSA No. 8 Limited Partnership For Designation As An Eligible Telecommunications Carrier, WUTC Docket No. UT-023040, Order Granting Petition for Designation as an Eligible Telecommunications Carrier, ¶¶ 15 & 65 (August 30, 2002) (Inland Order).

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telecommunications services and diversity of supply are consistent with these principles. *Id*.

- Staff asserts that the Rural ILECs' concerns regarding the designation of additional ETCs in their service areas are not well-founded. Staff notes that FCC HCF rules do not result in a reduction of federal high-cost fund support when an additional ETC receives support. The manner by which rate-of-return rural companies' costs are supported actually results in an increase in federal support on a per-line basis if competition results in a reduction of the total number of lines served by a rural ILEC. *Id. at 8*.
- 29 Staff reminds the Commission that in the past four years during which Rural ILECs have faced competition from wireless ETCs, no Rural ILEC has asked the Commission to increase its revenue requirement. Staff contends this observation supports the conclusion that designation of additional ETCs has not harmed consumers receiving basic telecommunications service from Rural ILECs. *Id.*
- Staff asserts that granting AWS's petition would be consistent with the *Virginia Cellular* decision, as well as with other ETC designations by this Commission. *Id. at* 5-6. Staff notes that the only difference between the FCC's analysis in *Virginia Cellular* and this Commission's prior ETC designations is that the FCC considered the effect of the designation on the federal HCF. Staff recommends that this Commission not consider the effect on the fund, because the fund is wholly within the control of the FCC. The effect on the federal HCF is a national issue, and the FCC has not made significant changes in the last four years.
- Staff also noted that the Federal-State Joint Board's Recommended Decision is only that—a recommendation. It is not binding on the Commission. Even if the

FCC were to adopt the recommendation, the result would be guidelines that are permissive only.

#### III. COMMISSION DISCUSSION AND DECISION

# A. Legal and Policy Issues

- Under the federal Act, Congress conferred on state commissions the authority to designate common carriers as ETCs. 47 U.S.C. § 214(e)(2). Congress amended the Act to authorize the FCC to designate common carriers as ETCs where the state commission has no jurisdiction over the common carrier. Id. § 214(e)(6); (Amendment of Communications Act of 1934, Pub. L. No. 105-125, 111 Stat. 2540 (1997)). The FCC does not have the jurisdiction to designate common carriers concurrent with the states.
- Congress left to the state commissions to determine whether the designation of a common carrier as an ETC is in the public interest. 47 U.S.C. § 214(e)(2). The Commission may look to the decisions of the FCC and other states for guidance as to the meaning of "public interest," but the Commission is not bound by those decisions.
- Contrary to the contentions of Rural ILECs, the FCC's decision in *Virginia Cellular* is not binding on this Commission. In *Virginia Cellular*, the FCC intended to apply the framework in that decision to other ETC designations pending before the FCC.<sup>6</sup> The FCC did not—indeed cannot—bind state commissions to its analysis.
- 35 The Commission declines the Rural ILECs' request that we initiate an adjudicative proceeding to consider what weight to give the recommended decision of the Federal-State Joint Board on Universal Service. The

<sup>6</sup> See Virginia Cellular, ¶ 4.

Recommended Decision is not binding on the Commission, and even if it were, it sets forth permissive guidelines. The Commission is not persuaded that it must conduct an adjudication to determine whether the designation of AWS as an ETC will harm customers served by Rural ILECs. We give significant weight to Staff's observation that in the four years since wireless carriers have been designated as ETCs in areas served by Rural ILECS, no Rural ILEC has requested an increase to its revenue requirement. No customer of a Rural ILEC has complained to the Commission that the designation of a wireless carrier as an additional ETC has caused harm. In comparison, rural ILECs' bare assertions of potential harm, unsupported by facts, are unavailing.

The Commission also will not conduct a proceeding to determine what, if any, effect the designation of AWS as an additional ETC in areas served by Rural ILECs will have on the federal HCF. As noted by Staff, this Commission does not have authority over the federal HCF and the effect of additional ETC designations in areas served by rural carriers should be addressed at a national level. In addition, AWS stated during the Open Meeting that inclusion or exclusion of AWS in the fund will not have any effect on what customers contribute because the total impact would not change even one number to the right of the decimal point in the percentage the FCC requires companies to contribute. This Commission has considerable experience with these matters, which assists in understating the implications of a decision to grant AWS's petition.

 $<sup>^{7}</sup>$  The FCC is unable to draw a conclusion regarding the impact of a single ETC designation on the HCF. *Virginia Cellular*,  $\P$  31, n.96. ("We note, however, in light of the rapid growth of competitive ETCs, comparing the impact of one competitive ETC on the overall fund may be inconclusive.")

<sup>&</sup>lt;sup>8</sup> We note that Staff provided information that suggests 93% of the increase in the fund over the last four years is a result of increased payments to rural ILECs rather than increased support for wireless and other non-ILEC ETCs. Staff Memorandum, at 6 n.14.

### B. Designation of AWS Meets the Requirements of Section 214(e)

- 1. AWS Will Provide the Required Services
- AWS provides or will provide the nine services ETCs must provide pursuant to 47 C.F.R. § 54.101(a) and (b). *Petition*, ¶ 15. AWS has described how it provides each of those services. *Id.* ¶¶ 16-24. AWS will advertise the availability of these services throughout its service area in media of general distribution. *Id.* ¶ 25. AWS must offer Lifeline and Link Up discounts. 47 C.F.R. §§ 54.101, 201, 405, 411. AWS may use the support it receives from the federal HCF only for the provision, maintenance, and upgrading of facilities and services for which support is intended. 47 U.S.C. § 254(e).
- AWS supported its petition with the affidavit of Karl Korsmo, Vice President, External Affairs. *Id.*, *Exhibit E.* Mr. Korsmo appeared at the Open Meeting and reiterated AWS's intention to fulfill its ETC obligations. In determining whether a petitioner for ETC designation has demonstrated that it will provide and advertise the required services, the Commission may accept a sworn statement from the petitioner as evidence.<sup>9</sup>
- In seeking ETC designation, AWS is not required to demonstrate that it can provide service in every portion of the area for which it seeks designation. If that were the standard, carriers would be required to make the investment to serve non-economic markets before knowing whether or not federal support would be available to supplement the otherwise insufficient revenue available in the service area. Such an approach would not advance universal service, and

<sup>&</sup>lt;sup>9</sup> See In the Matter of the Petition of Unites States Cellular, et al., for designation as Eligible Telecommunications Carriers, WUTC Docket No. UT-970345, Third Supplemental Order Granting Petition for Designation as Eligible Telecommunications Carrier, ¶ 12-13 (Jan. 27, 2000) (U.S. Cellular Order); RCC Order, ¶¶ 43-44; Inland Order, ¶¶ 44-45; see also In the Matter of Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling, CC Docket No. 96-45, 15 FCC Rcd 15,168, 15,178, ¶ 24 (2000).

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it would eliminate any possibility of fair competition throughout low-revenue service areas.<sup>10</sup>

# 2. Granting AWS's Petition Is In the Public Interest

"Public interest" is a broad concept encompassing the welfare of present and future consumers, stakeholders, and the general public. The "public interest" is broader than the goal of competition alone, and broader than the goal of advancing universal service alone; and we believe the decision today advances these two goals. Designating AWS as an ETC furthers the public interest because consumers will receive benefits from increased competition in the form of a greater variety of services and more comparability of services, compared to more urban areas. Rural customers also benefit because they, rather than the government, will choose which services meet their telecommunications needs.

Urban customers can choose among many companies and technologies because companies serving in urban areas can earn sufficient revenue to pay for necessary investment. Rural ILECs receive support because they serve few customers and, in some cases, those customers are located in difficult terrain. State and federal policies support all lines provided by rural ILECs; even multiline businesses receive supported service. Because of the limited opportunities for revenue in areas served by rural ILECs, there will be no competition—and no customer choice—without multiple ETCs.

We disagree with Rural ILECs, at this time, that too many ETCs in rural areas runs counter to the public interest.<sup>11</sup> The Commission believes that the public interest is better served by multiple ETCs. By competing with Rural ILECs, and other ETCs, ETCs will have to offer their services at a competitive price with a

<sup>&</sup>lt;sup>10</sup> See RCC Order, ¶ 48.

<sup>&</sup>lt;sup>11</sup> See Rural ILEC Comments, at 4.

high level of quality to make customers choose—and continue subscribing to—their services.<sup>12</sup> It is possible that changes in the administration of the HCF will prompt a review of our current policy, but under the current HCF rules our current policy is sound.

- The Commission's experience is that this approach, if not benefiting customers (which it does), certainly is not failing customers. In the four years since we first designated an additional ETC in rural areas, the Commission has received only two customer complaints, in which the consumers alleged that a non-rural, wireline ETC was not providing service. This record speaks for itself, and supports our practice of not seeking commitments or adding requirements as part of the ETC designation process.
- Granting AWS's petition also is consistent with the principles of competitive and technological neutrality. AWS offers service through technologies that Rural ILECs and other wireless carriers do not use. Consumers are better off when the government does not favor one technology over another, but instead lets consumers choose the technology, based on its own attributes (including quality of service), in comparison to the attributes of other technologies. Rural ILECs fault AWS for not including sufficient information in its petition to permit the Commission to weigh the unique advantages and disadvantages of AWS service. Based on that supposed deficiency, Rural ILECs request an adjudication to determine if AWS's services are needed by consumers. The Commission believes consumers are better able to choose which technologies meet their needs.

<sup>&</sup>lt;sup>12</sup> See U.S. Cellular Order, ¶¶ 31, 41, 47; RCC Order, ¶¶ 36, 59, 68; Inland Order, ¶¶ 38, 59.

<sup>&</sup>lt;sup>13</sup> The FCC stated the principle of competitive and technological neutrality is properly applied when "universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another." See First Report & Order, ¶ 47.

- This Commission and the carriers in this state have taken significant action to prevent cream-skimming by a carrier that would obtain ETC designation but not serve the highest-cost portion of the service area. This Commission has required the disaggregation of federal support. As a result, a company receives a relatively small amount of per-line support for serving areas with dense population.
- Rural ILECs contend that AWS may engage in cream-skimming when it seeks designation for some, but not all of the exchanges within its licensed service area. They express the concern AWS may elect ETC designation only in those exchanges with towns and highways, which would be profitable for AWS even without federal support.
- The Commission does not agree with Rural ILECs. AWS has licenses and is serving customers in portions of the areas where it seeks designation. AWS already serves towns and major highways, because the investment in those locations will generate a positive return on investment. AWS will receive HCF support in exchanges where it is designated as an ETC, and it will receive that support only if it attracts and keeps customers. It must serve the entire exchange, not just the town or highway where it already serves profitably. In addition, the support AWS will receive will be disaggregated. AWS must

<sup>&</sup>lt;sup>14</sup> See In the Matter of Disaggregation of Federal Universal Service Support of
Asotin Telephone Company, CenturyTel of Cowiche, Ellensburg Telephone Company, Inland
Telephone Company, Kalama Telephone Company, McDaniel Telephone Company, The
Toledo Telephone Company, United Telephone Company, Western Wahkiakum County
Telephone Company, Hat Island Telephone Company, Hood Canal Telephone Company, Inc.,
Mashel Telecom, Inc., Pend Oreille Telephone Company, Pioneer Telephone Company, St. John
Telephone & Telegraph Company, Tenino Telephone Company, Whidbey Telephone
Company, YCOM Networks, and Joint Petition of CenturyTel of Washington, Inc., and
CenturyTel of Inter Island, Inc. (collectively CenturyTel). For approval of USF Disaggregation
Plan, Order Rejecting Disaggregation Filings By Asotin Telephone Company And CenturyTel,
And Directing Rural ILECs To File Disaggregation Plans With The Commission Not Later Than
August 23, 2002, WUTC Docket Nos. UT-013058 and 023020 (August 2, 2002).

<sup>15</sup> RCC Order, ¶ 21.

invest its support only for universal service purposes. 47 U.S.C. 254(e). We note as well that AWS has sought designation in many Qwest exchanges even though there is no HCF support available to it in those exchanges. By seeking ETC designation, AWS has expanded its service obligation beyond those areas where it can serve profitably without designation.

- Rural ILECs raise questions about specific areas where AWS has not requested designation. AWS states that it is not seeking ETC designation in areas where it does not have sufficient facilities to enable it to represent that it could meet its obligation to serve those areas. Rural ILECs fault AWS for seeking designation in areas where it may not serve every customer, and at the same time fault AWS for not requesting designation for every possible exchange. However, AWS has requested designation for 242 exchanges, and the Commission sees no reason to designate AWS to serve areas for which it has not sought designation.
- Granting AWS's petition is consistent with state policy. ETC designation of AWS will maintain and advance the efficiency and availability of telecommunications services, ensure that customers pay reasonable rates for their services, and promote diversity in the supply of telecommunications services throughout the state. RCW 80.36.300.

#### IV. OTHER ISSUES

The Commission orders AWS to produce electronic maps of its licensed service areas. Production of electronic maps will assist AWS in claiming federal universal service funds to which it will become entitled. Those maps will also assist rural ILECs, the FCC (through the Universal Service Administration Company), and, if need be, this Commission, to determine the accuracy of requests for federal support that are based on customer location. AWS must prepare maps with the same standards and attributes required of rural ILECs, and its maps must be filed with the Commission, where they will be available

to rural ILECs. The availability of electronic maps from ETCs serving rural areas (including Rural ILECs, AWS, and others) will permit all interested persons to have an accurate representation of exchanges and service areas for the purpose of ensuring accurate requests for, and payment of, federal universal service support.

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A combination of state and federal laws impose upon any designated ETC an obligation to offer reduced-price telephone service to low-income customers within the designated service area of the ETC. 47 U.S.C. § 254(i), (j); 47 C.F.R. § 54.405, 411; RCW 80.36.420; WAC 480-122-020; Chapter 388-273 WAC. AWS acknowledges these obligations in its petition, and the commitments made by AWS in its petition are sufficient to meet the criteria for designation as an ETC. AWS will participate in the federal Lifeline and Link Up programs. AWS Petition, ¶ 27. In addition, AWS will offer additional discounts through the Washington Telephone Assistance Program, which is administered by the Department of Social and Health Services (DSHS). Id. ¶ 28. There is some uncertainty about the appropriate role of wireless carriers in the state lowincome program, but AWS has committed to work with DSHS to ensure proper implementation of WTAP.

#### V. FINDINGS OF FACT

- Having discussed above all matters material to our decision, and having stated general findings and conclusions, the Commission now makes the following summary findings of fact.
- 53 (1) AT&T Wireless PCS of Cleveland, LLC; AT&T Wireless Services of Washington, LLC; Spokane Cellular Telephone Company; Yakima Cellular Telephone Company; Bremerton Cellular Telephone Company; Olympia Cellular Telephone Company, Inc.; Bellingham Cellular

Partnership and Hood River Cellular Telephone Company, Inc., subsidiary licensees of AT&T Wireless Service, Inc. (d/b/a AT&T wireless), and referred to in this order as AWS, are telecommunications companies doing business in the state of Washington.

- 54 (2) AWS currently provides service in the exchanges listed in Appendix A.
- 55 (3) AWS's petition satisfies the requirements of 47 U.S.C. § 214(e)(2).
- 66 (4) AWS offers all of the services that are to be supported by the federal universal service support mechanisms set forth in 47 C.F.R. § 54.101(a).
- 57 (5) AWS competes with rural ILECs and other telecommunications carriers in the exchanges where it serves.

#### VI. CONCLUSIONS OF LAW

- The Commission has jurisdiction over the subject matter of this petition and over AWS with respect to its designation as an ETC.
- 59 (2) The Commission is not required by the Act or by any provision of state law to hold an adjudicative proceeding or other hearing prior to designating a telecommunication carrier an ETC.
- 60 (3) Granting AWS's petition for designation as an ETC in the exchanges listed in Appendix A is consistent with the public interest, and is consistent with applicable state and federal law.
- 61 (4) Granting AWS's petition for designation as an ETC in areas served by rural telephone companies is in the public interest.

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62 (5) Requiring AWS to create electronic maps of its licensed service areas is in the public interest.

63 (6) The Commission has authority to modify, suspend, or revoke the designations granted in this order at a future date.

#### VII. ORDER

- This Order decides issues raised in a non-adjudicative proceeding. Based on the foregoing, the Commission orders:
- (1) The Commission grants the petition of AT&T Wireless PCS of Cleveland, LLC; AT&T Wireless Services of Washington, LLC; Spokane Cellular Telephone Company; Yakima Cellular Telephone Company; Bremerton Cellular Telephone Company; Olympia Cellular Telephone Company, Inc.; Bellingham Cellular Partnership and Hood River Cellular Telephone Company, Inc., subsidiary licensees of AT&T Wireless Service, Inc. (d/b/a AT&T Wireless), as modified by this Order. Each of the requested designations set forth in Appendix A is granted.
- 66 (2) AWS must provide Lifeline and Link Up discounts consistent with 47 C.F.R. § 54.405 and 411.
- 67 (3) AWS must prepare electronic maps of its licensed service areas with standards and attributes as described in the Commission's Order in Docket No. UT-013058 and UT-023020, entered August 2, 2002.

68 (4) The Commission has authority to modify, suspend, or revoke these designations, including the service areas accompanying those designations, at a future date.

DATED at Olympia, Washington, and effective this 13th day of April, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

# APPENDIX A

SAC	TELEPHONE COMPANY	WIRE CENTER	R EXCHANGE
522416	Verizon Northwest Inc WA	ANCRWAXX	ANACORTES
		ARTNWAXX	ARLINGTON
		BNCYWAXX	BENTON CITY
		BOTHWAXB	BOTHELL
		BURLWAXA	BURLINGTON
		CMISWAXA	CAMANO ISLAND
		CAMSWAXX	CAMAS
		CLVWWAXA	CLEARVIEW
		CPVLWAXX	COUPEVILLE
		DRTNWAXX	DARRINGTON
		DVLLWAXX	DUVALL EAST
		EVRTWAXC	EVERETT CASINO
		EVRTWAXF	EVERETT MAIN
		EVRTWAXA	EVERETT PRIMARY CNTR
		FRFDWAXA	FAIRFIELD
		FRTNWAXX	FARMINGTON
		GRFDWAXX	GARFIELD
		MSCWIDXX	GARRISON
		GERGWAXX	GEORGE
		GRFLWAXX	GRANITE FALLS
		HLLKWAXX	HALLS LAKE
		JUNTWAXA	JUANITA
		KNWCWAXB	KENNEWICK MAIN
		KNWCWAXA	KENNEWICK-HIGHLANDS
		KNWCWAXC	KENNEWICK-MEADOW SPRINGS
		KRLDWAXX	KIRKLAND
		LKGWWAXA	LAKE GOODWIN
		LKSTWAXA	LAKE STEVENS
		MRWYWAXA	MANOR WAY
		MYVIWAXX	MARYSVILLE
		MONRWAXX	MONROE
		MTVRWAXX	MOUNT VERNON
		RCLDWAXA	NORTH RICHLAND
	·	OKHRWAXX	OAK HARBOR
		PALSWAXX	PALOUSE
		PLMNWAXX	PULLMAN
		QNCYWAXX	QUINCY
		RDMDWAXA	REDMOND
		RCLDWAXB	RICHLAND
		<b>RCBHWAXX</b>	RICHMOND BEACH
		RCFRWAXB	ROCKFORD

**ROSLWAXA ROSALIA SMSHWAXA** SAMMAMISH **SWLYWAXA** SEDRO WOOLLEY **SLLKWAXA** SILVER LAKE **SKYKWAXX SKYKOMISH SNHSWAXX SNOHOMISH SOLKWAXX** SOAP LAKE **STANWOOD STWDWAXX** SULTWAXX **SULTAN** TEKOWAXX -**TEKOA WSHGWAXA** WASHOUGAL **WSRVWAXA** WASHOUGAL RIVER **WRLDWAXA** WEST RICHLAND **WDLDWAXA** WOODLAND

522449 Verizon Northwest Inc. – WA

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**ACMEWAXA ACME ALGRWAXX ALGER BGLKWAXX BIG LAKE BIRCH BAY BRBAWAXA BLANWAXB** BLAINE **BURLWAXX** BURLINGTON CONCRETE **CNCRWAXX CNWYWAXX** CONWAY **CSTRWAXA CUSTER DMNGWAXA** DEMING **EDSNWAXX EDISON EVSNWAXX EVERSON FNDLWAXA FERNDALE LACNWAXX** LA CONNER **LARLWAXX** LAUREL LYMAN **HMTNWAXA** LYNDWAXX LYNDEN

MRBLWAXX MARBLEMOUNT

MTVRWAXX MOUNT VERNON-CONTEL

NCHSWAXX NACHES NILEWAXX NILE

SWLYWAXX SEDRO WOOLLEY

SUMSWAXX SUMAS

525161 Qwest Corp.	-WA
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AUBNWA01	AUBURN
BNISWA01	BAINBRIDGE ISLAND
BTLGWA01	BATTLEGROUND
BLFRWA01	BELFAIR
BLLVWAGL	BELLEVUE GLENCOURT
BLLVWASH	BELLEVUE SHERWOOD
BLHMWALU	BELLINGHAM LUMMI
BLHMWA01	BELLINGHAM REGENT
BDMDWA01	BLACK DIAMOND
BYLKWA01	BONNEY LAKE
BMTNWA01	BREMERTON ESSEX
BCKLWA01	BUCKLEY
CSRKWA01	CASTLE ROCK
CENLWA01	CENTRALIA
CHHLWA01	CHEHALIS
LSTNIDSH	CLARKSTON
CLELWA01	CLE ELUM
COLBWA01	COLBY
CRSBWA01	CROSBY
CRMTWA01	CRYSTAL MOUNTAIN
FDWYWA01	DES MOINES FED. WAY
DESMWA01	DES MOINES TAYLOR
ESTNWA01	EASTON
ENMCWA01	ENUMCLAW
EPHRWA01	EPHRATA
GRHMWAGR	GRAHAM
GRBLWA01	GREEN BLUFF
HDPTWA01	HOODSPORT
ISQHWAEX	ISSAQUAH
JOYCWA01	JOYCE
KENTWAME	KENT MERIDIAN
KENTWAOB	KENT O BRIEN
KENTWA01	KENT ULRICK
LACYWA01	LACEY
LBLKWA01	
LGVWWA02	LIBERTY LAKE LONGVIEW
MPVYWAMV	MAPLE VALLEY
MRISWA01	MERCER ISLAND
MSLKWAAB	MOSES LAKE AFB
MSLKWA01	MOSES LAKE ALDER
NPVNWA01	NAPAVINE
NWLKWA01	NEWMAN LAKE
OLYMWAEV	OLYMPIA EVERGREEN
OLYMWA02	OLYMPIA WHITEHALL
ORCHWA01	ORCHARDS
OTHEWA01	OTHELLO

PTANWA01 PORT ANGELES PTLWWA01 PORT LUDLOW **PTORWAFE** PORT ORCHARD PORT TOWNSEND PTTWWA01 PYLPWA01 **PUYALLUP** RNTNWA01 RENTON RDFDWA01 RIDGEFIELD ROCHESTER ROCHWA01 ROY WA01 ROY STTLWA05 SEATTLE ATWATER **STTLWACA** SEATTLE CAMPUS SEATTLE CHERRY STTLWACH SEATTLE DUMWAMISH **STTLWADU** STTLWA03 SEATTLE EAST STTLWAEL SEATTLE ELLIOTT STTLWA04 SEATTLE EMERSON **STTLWALA** SEATTLE LAKEVIEW STTLWA06 SEATTLE MAIN SEATTLE PARKWAY **STTLWAPA** SEATTLE SUNSET **STTLWASU STTLWAWE** SEATTLE WEST SEQMWA01 **SEQUIM** SHTNWA01 SHELTON SILVERDALE **SLDLWASI SPKNWACH** SPOKANE CHESTNUT **SPKNWAFA** SPOKANE FAIRFAX SPOKANE HUDSON **SPKNWAHD SPKNWAKY** SPOKANE KEYSTONE **SPKNWAMO** SPOKANE MORAN SPKNWA01 SPOKANE RIVERSIDE SPOKANE WALNUT **SPKNWAWA** SMNRWA01 SUMNER SNYSWA01 SUNNYSLOPE TACOMA FAWCETT **TACMWAFA TACMWAFL** TACOMA FORT LEWIS **TACMWAGF** TACOMA GREENFIELD **TACMWAJU** TACOMA JUNIPER **TACMWALE TACOMA LENOX** TACOMA LOGAN **TACMWALO** TACMWASY TACOMA SKYLINE **TACMWAWA TACOMA WAVERLY 2 TACOMA WAVERLY 7 TACMWAWV** VANCWA01 **VANCOUVER VANCWANO** VANCOUVER NORTH WRDNWA01 WARDEN

WINLOCK

YAKIMA CHESTNUT

YAKIMA WEST

WNLCWA01 YAKMWA02

**YAKMWAWE** 

SAC	TELEPHONE CO	MPANY	WIRE CENTER	EXCHANGE
			BCTNWAXX	BICKI FTON
522400	Sprint/United Tel.	NW – WA		D. C. (
			BRNNWAXX	BRINNON
			CNTRWAXX	CHIMACMCTR
			CLMAWAXA	COLUMBIA
			DLPTWAXA	DALLESPORT
			GRNRWAXX	GARDINER
			GLWDWAXA	GLENWOOD
			GLDLWAXA	GOLDENDALE
			GDVWWAXA	GRANDVIEW
			GRNGWAXA	GRANGER
			HRRHWAXA	HARRAH
			LYLEWAXA	LYLE
			MBTNWAXX	MABTON
			MTWAWAXA	MATTAWA
			PASNWAXA	PATERSON
			PLSBWAXX	POULSBO
			PRSRWAXA	PROSSER
			QLCNWAXA	QUILCENE
			RSVTWAXA	ROOSEVELT
			STSNWAXA	STEVENSON
			SNSDWAXX	SUNNYSIDE
			TPNSWAXX	TOPPENISH
			TRLKWAXX	TROUT LAKE
			WPATWAXX	WAPATO
			WHSLWAXX	WH SALMON
			WHSWWAXX	WHITE SWAN
			WHTSWAXA	WHITSTRAN
			WLRDWAXX	WILLARD
			WSHRWAXA	WISHRAM
			ZLLHWAXA	ZILLAH
522404	Asotin Tel. – WA		ANATWAXX ANA	ATONE
			ASOTWAXA ASO	NTO
522408	Century Tel. of		ALMRWAXA	ALMIRA
	Washington, Inc.		ASLKWAXA	AMES LAKE
	wasimigion, nic.		ARLTWAXX	ARLETTA
			ASFDWAXA	ASHFORD
			BSCTWAXX	BASIN CITY
			BLKIWAXX	BLAKELY ISLAND
			CRNTWAXX	CARNATION
			CTHLWAXA	CATHLAMET
			CHNYWAXC	CHENEY
			CLWRWAXA	CLEARWATER
			CNNLWAXA	CONNELL
			CETNWAXX	CRESTON
			ESNDWAXA	EAST SOUND

		EDWLWAXA ELMAWAXA ELTPWAXX FLCYWAXX FRKSWAXA FRHRWAXA GGHRWAXA HRTNWAXA KHLTWAXA KGTNWAXA LKBYWAXA LINDWAXA LINDWAXA LOPZWAXX MTCOWAXX MCCLWAXA MDLKWAXX MESAWAXX MRTNWAXX NBNDWAXA VSHNWAXA ORNGWAXA ORNGWAXA RYCYWAXA PGISWAXX RTVLWAXA SNPSWAXA SPRGWAXA SPRGWAXA VADRWAXA VSHNWAXA VSHNWAXA VSHNWAXA SPRGWAXA VADRWAXA VSHNWAXA VSCKWAXA VCLTWAXA	EDWALL-TYLER ELMA ELTOPIA FALL CITY FORKS FRIDAY HARBOR GIG HARBOR HARRINGTON KAHLOTUS KINGSTON LAKEBAY LIND LONG BEACH LOPEZ MATHEWS CORNER MCCLEARY MEDICAL LAKE MESA MORTON NORTH BEND NORTH VASHON OCEAN PARK ODESSA ORTING OTHELLO PUGET ISLAND REARDAN RITZVILLE SNOSQUALNIE PASS SOUTH PRAIRIE SPANGLE SPANGLE SPRAGUE VADER VASHON WASHTUCNA WILBUR WILSON CREEK YACOLT
522410	Century Tel. of Cowiche, Inc	YCLTWAXA  CWCHWAXX  RMRKWAXA  TITNWAXX	COWICHE RIMROCK TIETON
522412	Ellensburg Tel. Co.	ELBGWAXA KTTSWAXX	ELLENSBURG KITTITAS

		LDDLWAXA SELHWAXX THRPWAXA VNTGWAXX	LAUDERDALE SELAH THORPE VANTAGE
522417	Hat Island Tel. Co.	SWHDWAXX	HAT ISLAND
522419	Hood Canal Tel. Col, Inc.	UNINWAXB	UNION
522423	Inland Tel. Co. – WA	RSLNWAXX UNTWWAXA	ROSLYN UNIONTOWN
522426	Kalama Tel. Co.	KALMWAXB	KALAMA
522427	Lewis River Telephone Co., d/b/a TDS Telecom	AMBYWAXA LACTWAXA YALEWAXX	AMBOY LA CENTER YALE
522430	McDaniel Tel. Co. dba TDS Telecom	MSRKWAXX ONLSWAXA SLKMWAXB	MOSSY ROCK ONALASKA SALKUM
522431	Mashell Telecom, Inc.	ETVLWAXA	EATONVILLE
522442	St. John Telephone and Telegraph	STJHWAXA	ST JOHN
522446	Tenino Tel. Co.	TENNWAXA	TENINO
522447	Toledo Te. Co. Inc.	TOLDWAXA	TOLEDO
522451	Western Wahkiakum County Tel Co.	. GRRVWAXA NASLWAXX	GRAYS RIVER NASELLE

Whidbey Tel. Co. 522452 **PNRBWAXA** POINT ROBERTS CLTNWAXA SOUTH WHIDBEY FELDWAXA LNGLWAXA SWHDWAXX 522453 Yelm Tel. Co. RANRWAXA RAINIER YELMWAXA YELM YELMWAXB



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# PUBLIC SERVICE COMMISSION OF WEST VIRGINIA CHARLESTON

Entered: May 14, 2004

CASE NO. 03-0935-T-PC

EASTERBROOKE CELLULAR CORPORATION,
doing business as CELLULAR ONE.
Petition for consent and approval to be
designated as an eligible telecommunications
carrier in the areas served by Citizens
Telecommunications Company of West Virginia,
doing business as Frontier Communications of
West Virginia.

#### RECOMMENDED DECISION

#### PROCEDURE

On June 19, 2003, Easterbrooke Cellular Corporation, doing business as Cellular One (Easterbrooke), filed a petition with the Public Service Commission for designation as an eligible telecommunications carrier (ETC), pursuant to Section 214(e)(2) of the Communications Act of 1934, for the receipt of support from the Federal Universal Service Fund Program in those areas of Easterbrooke's service territory served by rural telephone companies (RTC). Easterbrooke represented that it satisfied all of the conditions set forth in Section 214(e)(1) of the Act and, therefore, is qualified for designation by the Commission as ETC.

According to the petition, Easterbrooke was established in 1990 and is an authorized wireless carrier operating in West Virginia. It is also a telecommunications carrier as defined by the Communications Act of 1934. By Recommended Decision entered on May 29, 2003, which became final on June 7, 2003, in Case No. 02-1118-T-PC, Easterbrooke was designated as an ETC for all wire centers served by Verizon within Easterbrooke's service territory. Easterbrooke is now seeking ETC status for that part of its service territory served by Citizens Telecommunications Company of West Virginia, doing business as Frontier Communications of West Virginia (Frontier), a rural telephone company. Easterbrooke attached a map of its service areas to its petition.

Easterbrooke listed the criteria which the Commission must apply in considering Easterbrooke's petition:

- (a) Easterbrooke must be a common carrier;
- (b) Easterbrooke must offer or be capable of offering the services supported by universal service, which the FCC has identified as:

- voice-grade access to the public switched telephone network (PSTN);
- local usage;
- dual tone multi-frequency (DTMF) signaling or its functional equivalent;
- single-party service or its functional equivalent;
- 5. access to emergency services;
- 6. access to operator services;
- 7. access to interexchange services;
- 8. access to directory assistance; and
- 9. toll limitation for qualifying low-income consumers;
- (c) Easterbrooke must make available or commit to make available the supported services throughout the designated service area; and
- (d) Easterbrooke must advertise or agree to advertise the availability of, and charges for, the supported services.

Easterbrooke asserted that it is capable of providing and has commenced the provision of the required services in one or more of the designated areas. Easterbrooke attached as Exhibit B to its petition a list of exchange and/or central office codes with respect to which it is currently providing, or has the present capability to provide, all federally supported services. A list of wire center codes comprising the requested ETC service area was also attached to the petition as Exhibit Easterbrooke filed a sample of the promotional materials currently being used, published or broadcast by Easterbrooke in West Virginia as Easterbrooke asserted that it is capable of providing the Exhibit D. required services within the part of its service territory served by Frontier and it provided specific information regarding its provision of each of the supported services set forth above. Easterbrooke also noted that, as an ETC, it would be required to offer Link-up and Lifeline services as part of its service offerings to low-income subscribers. currently provides those services to its low-income subscribers in the areas where it has already been designated as an ETC. Upon designation as an ETC within Frontier's service area, it will also provide such services to its eligible customers in that service territory.

Easterbrooke pointed out that Section 214(e)(2) of the Act provides that a state commission may designate an eligible common carrier as an ETC in an area served by an RTC, so long as the designation is in the public interest. It also asserted that the Commission has previously found that the provision of increased choices in technology, services and prices for consumers in an RTC's service territory has been adequate to meet the public interest requirements for designation as an ETC in an RTC service territory. Citing Case No. 01-0488-T-PC, FiberNet, LLC, Recommended Decision entered November 14, 2001, final December 4, 2001, Easterbrooke noted that the Commission found in that case that FiberNet's assertion of greater consumer choice within Frontier's service territory was sufficient to meet the public interest requirement for designation as an ETC in those areas served by Frontier as an RTC.

Easterbrooke also noted that, as a wireless carrier, it will not be offering service in competition with Frontier, which is a local exchange carrier. Easterbrooke asserted that its services will complement, rather than compete with, Frontier's services. As a wireless carrier, Easterbrooke will offer customers in Frontier's service territory where Easterbrooke operates a choice of rate plans and services. The granting of the ETC designation for Easterbrooke in those areas served by Frontier will bring greater choice for customers and, therefore, is in the public interest. Accordingly, Easterbrooke requested that the Commission designate it as an eligible telecommunications carrier in the part of Frontier's service territory which overlaps Easterbrooke's authorized service area, for purposes of receiving federal universal service support, effective immediately.

On July 9, 2003, Staff Attorney Meyishi Blair filed the Initial Joint Staff Memorandum in this proceeding, attached to which was the Utilities Division Initial Recommendation prepared by Technical Analyst Dannie L. Walker. Commission Staff represented that it was in the process of reviewing this matter and would make appropriate recommendations once that review has been completed.

On July 16, 2003, Citizens Telecommunications Company of West Virginia, doing business as Frontier Communications of West Virginia, by counsel, filed a petition with the Public Service Commission to intervene in this proceeding, stating that it has a legal interest in the subject matter being addressed. Frontier noted that Easterbrooke must demonstrate that it provides all of the services supported by the Federal universal service program and that designating Easterbrooke as an additional ETC in Frontier's study areas is in the public interest. Frontier also stated that granting its motion will not delay or hinder the schedule with respect to the consideration of the Easterbrooke's request.

By Commission Order entered on July 22, 2003, the Commission referred this matter to the Division of Administrative Law Judges for a decision to be rendered on or before January 15, 2004.

On August 7, 2003, the Consumer Advocate Division of the Public Service Commission (CAD) filed a petition to intervene in this matter, on behalf of Frontier's ratepayers, representing that Easterbrooke's petition for designation as an ETC constituted a proceeding with the potential for adverse effects on Frontier's ratepayers.

On August 6, 2003, in another proceeding pending before the Commission, Case No. 03-0781-T-GI, a petition filed by the Consumer Advocate Division of the Public Service Commission to initiate a general investigation of Federal universal service funding for eligible telecommunications carriers, Commission Staff filed an initial recommendation that Easterbrooke's petition for designation as an ETC be held in abeyance pending the resolution of the issues raised by the CAD in its petition for general investigation.

On September 8, 2003, Easterbrooke filed a response herein to the Initial Staff Memorandum in Case No. 03-0781-T-GI, strongly objecting to the suggestion that its case be held in abeyance, asserting that such

recommendation is contrary to West Virginia law, as well as the Communications Act of 1934. Easterbrooke noted that it filed its petition prior to the Staff's request for abeyance and that the petition should be processed in a timely manner.

On September 9, 2003, Easterbrooke filed pages that had been inadvertently omitted from its September 8, 2003 filing.

Pursuant to Commission policy, the Final Joint Staff Recommendation in this proceeding was due no later than Wednesday, September 17, 2003.

By Procedural Order issued on October 21, 2003, a procedural schedule was adopted for the processing and resolution of this case, which, among other things, required Commission Staff to file its Final Joint Staff Recommendation no later than October 29, 2003; required a settlement to be filed, if the parties agreed with the discussion contained in that Order, no later than Friday, November 7, 2003; and scheduled this matter for hearing to be held on November 12, 2003, at the Public Service Commission Building, 201 Brooks Street, Charleston, West Virginia, and to continue on that date until concluded. Additionally, a schedule for the filing of the transcript and initial and reply briefs was also established. Finally, the Order granted the petitions to intervene filed in this proceeding by Frontier and the CAD.

In the discussion in that Procedural Order, the undersigned noted that a review of the petition and the petitions to intervene tended to indicate that the sole issue in dispute in this matter, i.e., whether it is in the public interest to designate Easterbrooke as an ETC in Frontier's service territory, given Frontier's status as an RTC, was identical to the issue which pending before the Commission on exceptions in <u>Highland Cellular</u>, <u>Inc.</u>, Case No. 02-1453-T-PC. The undersigned expressed the opinion that, for all intents and purposes, the Commission's decision on exceptions in the Highland proceeding would decide the issue in this proceeding and that, given the similarity between the parties and counsel participating in this case and the parties and counsel who participated in the Highland case, any record generated from a hearing in this case would be fairly similar to, if not identical to, the record generated in the Highland proceeding. The undersigned expressed the opinion that it would not appear to be an efficient or reasonable use of the resources and time of either the parties or the Commission to completely relitigate the same issues that are currently pending before the Commission on exceptions in Highland. The undersigned expressed the opinion that it would be in all of the parties' interests to enter into a joint stipulation and agreement for settlement, providing for the designation of Easterbrooke as an ETC in Frontier's service territory, if the Commission affirms the ETC designation of Highland Cellular, Inc., in Case No. 02-1453-T-PC.

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On October 29, 2003, Staff Attorney Blair filed an Interim Joint Staff Memorandum, attached to which was the Utilities Division Interim Report in this proceeding, prepared by Mr. Walker. According to Mr. Walker, after the entry of the October 21, 2003 Procedural Order, Staff met with representatives of Frontier, Easterbrooke and the CAD on October 27, 2003. Staff went into the meeting prepared to report the undersigned's recommendations; however, it became clear at the meeting that,

while there were many similarities between this case and the <u>Highland</u> case, there are certain "significant and intransigent" issues which the parties to this case desire to litigate. The attendees agreed that the CAD should seek an extension of the Administrative Law Judge's decision due date and a continuation of the hearing until sometime in January. Staff indicated that its substantive recommendation would be filed in the future.

On November 3, 2003, the CAD filed two documents in this proceeding, one with the Administrative Law Judge, responding to the Procedural Order and requesting a continuance of the hearing and a modification of the procedural schedule, and one to the Commission, requesting a 120-day extension of the Administrative Law Judge's existing decision due date. In the CAD motion directed to the Administrative Law Judge, the CAD listed three issues which it believed differed from the issues being considered by the Commission in Highland and which may warrant development at hearing. First, the CAD wishes to present testimony and evidence regarding its "benchmark standard" for determining whether the public interest warrants designating additional ETCs in a rural telephone company's study area. The CAD proposed this standard in its briefs filed in the Highland case, although there was no direct testimony or other evidence to support that proposal in the Highland case. Easterbrooke and Frontier oppose aspects of the CAD's proposal and would want to introduce their own testimony and evidence to support their positions regarding the CAD's proposal. Second, the wire centers in Frontier's service territory in which Easterbrooke seeks ETC status are not the same as those for which Highland sought ETC status. Accordingly, there may be issues relating to Easterbrooke's ability to serve those wire centers which differ from the issues before the Commission in Highland. Third, Easterbrooke's call routing arrangement with Frontier is different from the arrangement between Highland Cellular and Frontier. Accordingly, there may be issues relating to whether Easterbrooke provides the services supported by universal service which differ from the issues before the Commission in Highland.

The CAD motion went on to state that the parties are not prepared to go forward to hearing on these issues on November 12, 2003. The parties wish to conduct discovery regarding the issues that differ from those before the Commission in Highland. Further, Frontier's counsel had a Finally, to the extent the CAD's scheduling conflict on that date. benchmarking proposal would be at issue, the parties wanted to prefile testimony on that issue, as well as other issues that differ from the issues pending before the Commission in Highland. The CAD's motion set forth a proposed procedural schedule, which called for a deadline for submitting discovery requests of November 14, 2003; responses to discovery to be filed on or before December 5, 2003; prefiled testimony and prefiled rebuttal testimony to be filed on December 12 and December 19, 2003, respectively; and hearing to be conducted in January of 2004. Certain scheduling conflicts were listed for Easterbrooke in the month of January.

By Commission Order entered on November 7, 2003, the decision due date was extended to May 14, 2004.

By Procedural Order also issued on November 7, 2003, the undersigned cancelled the procedural schedule established by the Procedural Order issued on October 21, 2003, including the hearing date of November 12, 2003, since it was apparent that the parties were not prepared to go to hearing. The undersigned also adopted part of the procedural schedule proposed by the parties, i.e., the portion relating to discovery and the The Order noted that scheduling for the prefiling of testimony. Easterbrooke hearing would have to await the scheduling of the hearings in the various Rule 30-C cases currently pending before the Commission. Additionally, the undersigned removed the CAD's benchmark proposal from this proceeding and deferred it to Case No. 03-1199-T-GI, the general investigation established by the Public Service Commission regarding the conditions which would be applicable to all ETC applicants in West Virginia in the future. The undersigned expressed the opinion that the CAD's benchmark standard was not a legitimate issue in this case, although it was appropriate for consideration in the general investiga-The undersigned determined that, in this proceeding, Easterbrooke would be held to the same standards which had been applied to other ETC applicants at the Public Service Commission to date, no less and no more. The undersigned further asserted that it would be grossly unfair and inappropriate to litigate in this proceeding a matter of policy which would have general applicability to all future ETC applicants before the Commission, when the general investigation was started expressly for that The undersigned also stated that, if the CAD's benchmarking proposal was the sole point on which the CAD would refuse to sign a stipulation and agreement for settlement in this matter or was the stumbling block to a more timely resolution of this case, the undersigned did not consider the CAD's participation in such a settlement to be critical.

On November 17, 2003, the CAD filed a petition for reconsideration with the Administrative Law Judge asking her to reconsider her Procedural Order of November 7, 2003. The CAD objected to the removal of the benchmarking standard from this proceeding and its deferral to the general investigation. The CAD argued strenuously that the benchmarking proposal was not a rule adopted by the Commission and that it would not be grossly unfair or inappropriate to consider its proposal in making the public interest determination required in this case. The CAD argued that its benchmarking proposal was an analytical framework for the public interest test that the CAD, as a party, should be entitled to present in this particular case concerning this particular application.

On November 18, 2003, the CAD filed a page which had been inadvertently omitted in its filing of November 17, 2003. In that page, the CAD argued that its benchmarking proposal simply advanced an objective, straightforward standard for making the public interest determination required in this proceeding.

On November 24, 2003, Easterbrooke filed its opposition to the CAD's petition for reconsideration. Easterbrooke argued that the ALJ correctly interpreted the CAD's suggested benchmarking standard as a potential rule of general applicability more properly considered in the general investigation. Easterbrooke pointed out that the definition of a rule set forth in West Virginia Code \$29A-1-2(1), part of the West Virginia Administrative Procedures Act, would include the standard proposed by the

CAD and was properly the subject of a rulemaking and not an adjudication. Additionally, Easterbrooke argued that no compelling reasons exist for consideration of the CAD's proposal in this case. There are no facts or circumstances particular to Easterbrooke's application that demand a case-by-case adjudication of the CAD's proposed standards. since the CAD's proposal will be dealt with in the general investigation. there was no urgent need to address it in this case. Easterbrooke argued that, since the CAD's proposed standard would significantly amend existing law, was intended to be applied generally to all ETC applicants and was already one of the designated subjects to be considered in the general investigation, the appropriate forum for evaluating that standard was a rulemaking or general investigation. Easterbrooke noted that the CAD proposal essentially would substitute one set of standards for another set and apply those new standards to pending and future ETC applicants. The CAD's proposed standard created a rebuttable presumption based upon a series of calculations which served as a threshold determination for the public interest, instead of the simultaneous consideration of a series of factors in evaluating where the public interest lies. By creating an immediate hurdle for ETC applicants to overcome, prior to consideration of any other factors, the proposed benchmark standard constituted a radical departure from current Public Service Commission practice and law.

Easterbrooke further noted that it would be unfair to future ETC applicants, and other elements of the public who would have an interest in the outcome of any proceeding regarding the benchmark standard, to force intervention by them in Easterbrooke's case for the sole purpose of litigating the validity of the CAD's proposed standards, when those parties would find it necessary, as well, to defend their interests in the general investigation. Further, many interested parties would not be aware of the impact that consideration of the proposed benchmark standard in the context of the Easterbrooke case may have on their own pending or future petitions for ETC designation and thus would not have received the requisite notice for intervention. Easterbrooke also argued that it was patently unfair to call upon it alone to bear the burden and expense of litigating what it believed, in essence, was a standard that may be applicable to all future ETC applicants. Easterbrooke characterized the CAD's argument as inaccurate and disingenuous with respect to the characterization of its proposed benchmark standard, stating that the proposed benchmark completely redefines the public interest inquiry for ETC applications. Easterbrooke also argued that it would be unfair to require it to be judged on the basis of different standards than those which have been applied to other ETC applicants at the Public Service Easterbrooke argued that the CAD's petition should be Commission. denied, because its proposed benchmark was, by any stretch of the imagination, a rulemaking proposal which should be considered only within the purview of the general investigation.

On December 2, 2003, the CAD filed its reply to Easterbrooke's opposition to the CAD petition for reconsideration. The CAD again argued that its benchmarking proposal provided an objective framework for the public interest determination and asserted that its benchmarks were presumptive only and could be overcome by specific evidence concerning particular applicants in particular areas. The CAD argued that its proposal did not limit or eliminate the public interest inquiry that the

Commission must make in response to a carrier's petition to be designated as an ETC in rural study areas. The CAD argued that its proposed standard was not a potential rule, and it argued that the Commission's adoption of the CAD's benchmarking proposal was something that might or might not occur in the general investigation. The CAD denied that consideration of its benchmarking proposal in this proceeding would deprive Easterbrooke or anyone else of due process. The CAD also arqued that it was appropriate to consider the CAD's proposal because the CAD's proposal supported the public interest by considering who paid for the additional ETCs that are designated to receive federal universal service support in high cost rural areas. The CAD argued that Easterbrooke's claim that the CAD's proposal should be excluded from this case until the Commission may adopt a standard harms the public by insuring they will continue to pay for more and more ETCs, regardless of whether it makes economic sense to support additional ETCs.

On December 3, 2003, Frontier filed a response in support of the CAD's petition for reconsideration and in opposition to Easterbrooke's opposition to the CAD's petition for reconsideration. For the most part that document parroted the CAD's arguments, with one exception. Frontier made the argument that the undersigned had no authority to limit the issues in proceedings before her.

By Procedural Order issued on December 12, 2003, the CAD's petition to the Administrative Law Judge to reconsider her Order of November 7, 2003, was denied for the reasons set forth therein. Additionally, a procedural schedule was established for the processing and resolution of this case, which set this matter for hearing to be held on January 20 and 21, 2004, at the Public Service Commission Building, Charleston, West Virginia, and allowed all parties to file initial briefs on or before February 24, 2004, with reply briefs to be filed on or before March 5, 2004.

Easterbrooke and Frontier filed prepared direct testimony on December 12, 2003, as provided in the procedural schedule. Commission Staff and the CAD filed letters indicating that, while they were not filing prepared direct testimony, they reserved the right to file rebuttal testimony. Rebuttal testimony was filed by Easterbrooke, Frontier and the CAD on December 19, 2003.

On January 9, 2004, Robert R. Rodecker, a member in good standing with the West Virginia State Bar and local counsel for Easterbrooke, filed a Motion for Pro Hac Vice Admission of Michael F. Morrone, an attorney in good standing with the District of Columbia Bar, so that Mr. Morrone could assist and appear as co-council in this action before the Commission. An application for Pro Hac Vice Admission of Michael F. Morrone, setting forth Mr. Morrone's qualifications, was attached to the Motion as Exhibit A. A copy of the letter sent to the West Virginia State Bar transmitting the required filing fee and a copy of the Motion and Application filed with the Commission were also included as part of the January 9, 2004 filing.

On January 14, 2004, Frontier filed a motion to strike the prefiled rebuttal testimony of Easterbrooke witness Don J. Wood, arguing that Mr. Wood's rebuttal testimony contained legal argument that was inappropriate

for presentation as factual testimony and which Frontier alleged cited to various court, state Commission and FCC decisions; purported to interpret and apply them; and attempted to the define the scope of legal inquiry in this case and raise evidentiary objections to other testimony.

On January 16, 2004, the undersigned issued a Procedural Order granting the motion and application for <u>Pro Hac Vice</u> Admission of Michael F. Morrone, which was filed on January 9, 2004.

Also on January 16, 2004, Easterbrooke filed its opposition to Frontier's motion to strike Mr. Wood's prepared testimony. Easterbrooke arqued that its witness was simply properly offering facts and opinion to refute those offered by Frontier's witness, J. Michael Swatts. Easterbrooke argued that there was no question that Mr. Wood's expertise qualified him as an expert witness and that his offering of facts and opinion was appropriate for rebuttal testimony. Easterbrooke noted that, in his direct testimony, Mr. Swatts offered a number of opinions regarding whether Easterbrooke met the requirements of offering the nine supported services and whether it was in the public interest to designate Easterbrooke as a competitive ETC. Mr. Wood's testimony simply responded to the testimony of Mr. Swatts. Easterbrooke went on to state that nowhere did Mr. Wood resort to legal argument on the state of the law in West Virginia nor did he attempt to interpret the law. Instead, he offered assessments on Easterbrooke's ability to comply with current FCC and Commission policy regarding the provision of the required services and whether or not Easterbrooke's designation meets the public interest requirement.

The hearing set for January 20, 2004, was held as scheduled, with Robert R. Rodecker, Esquire, and Michael F. Morrone, Esquire, appearing on behalf of Easterbrooke; John B. Adams, Esquire, appearing on behalf of Frontier; Patrick W. Pearlman, Esquire, appearing on behalf of the CAD; and Staff Attorney Meyishi Blair, Esquire, appearing on behalf of Commission Staff. At the commencement of the hearing, the undersigned denied Frontier's motion to strike portions of the rebuttal testimony of Easterbrooke witness Wood, stating that a review of Mr. Wood's testimony indicated that, in each instance cited, he was simply responding to statements made by Frontier witness Swatts in his prepared direct testimony. Before any witnesses were called, the parties indicated that a Joint Stipulation and Agreement for Partial Settlement had been entered into by them with respect to several of the issues which normally would The Joint Stipulation and Agreement for be addressed in the case. Partial Settlement was received into evidence as Joint Exhibit No. 1. Easterbrooke presented the testimony of two witnesses and introduced three exhibits into evidence; Frontier presented the testimony of one witness and introduced two exhibits into evidence; and the CAD presented the testimony of one witness and introduced three exhibits into evidence. Frontier attempted to introduce a third exhibit into evidence, but it was stricken from the record. At the conclusion of hearing on January 20, 2004, this matter was submitted for a decision. A second day of hearing was not necessary.

The transcript of the hearing in this matter was filed on February 4, 2004, and consists of 151 pages of testimony and argument.

Easterbrooke, Frontier and the CAD filed Initial Briefs and/or Proposed Findings of Fact and Conclusions of Law, and those three parties also filed Reply Briefs. Commission Staff did not file an initial or reply brief in this matter.

On February 24, 2004, Frontier filed a letter regarding the exchange of traffic between Frontier and Easterbrooke, as a result of certain testimony and questioning during the hearing held on January 20, 2004.

## EVIDENCE

The first exhibit introduced into evidence in this proceeding was the Joint Stipulation and Agreement for Partial Settlement executed by and between Easterbrooke, Commission Staff, the CAD and Frontier. Joint Exhibit 1 represents a settlement among the parties regarding some of the issues raised in Easterbrooke's petition to be designated as an ETC in that part of Frontier's service area for which Easterbrooke is licensed by the FCC to provide commercial mobile radio service (CMRS). Exhibit 1, the parties agreed and recommended that, if the Commission enters an order designating Easterbrooke as an ETC in certain portions of Frontier's service territory, certain conditions should apply and certain procedures should be followed. However, by entering into the Joint Stipulation, the parties did not waive their rights to take any position they deem appropriate on the threshold issues of whether designating Easterbrooke as an ETC is in the public interest and whether Easterbrooke provides access to the public switched network.

In sum, the parties agreed that Easterbrooke is a common carrier; that Easterbrooke, throughout its CMRS licensed area, offers and advertises, using media of general distribution, the following services: (1) local usage; (2) dual tone multi-frequency (DTMF) signaling or its functional equivalent; (3) single party service or its functional equivalent; (4) access to emergency services; (5) access to operator services; (6) access to interexchange services; (7) access to directory assistance; and (8) toll limitation for qualifying low-income consumers. The Stipulation further acknowledges that Easterbrooke does not offer or advertise the services listed above outside of its CMRS licensed area and that Easterbrooke agrees that it will offer Lifeline and Link-Up services (known as Tel-Assistance services in West Virginia) throughout its designated service area upon being designated as an ETC.

Easterbrooke further agreed that it will abide by the following conditions as long as it retains its ETC designation in West Virginia:

- A. As an ETC, Easterbrooke will be obliged to provide service to existing or potential customers upon reasonable request. Such requests may come from consumers who reside within Easterbrooke's CMRS license area, but are unable to receive an adequate signal. In response to such requests, Easterbrooke will take the following steps:
  - 1. If a request comes from a party within its existing network, Easterbrooke will make commer-

cially reasonable efforts to provide service as soon as possible;

2. If a request comes from a party residing in an area that lies within Easterbrooke's CMRS license area, but which is not receiving service from Easterbrooke's authorized facilities, Easterbrooke will take a series of steps to provision service, namely:

First, it will determine whether the requesting party's equipment can be modified or replaced to provide acceptable service in a cost-effective manner;

Second, it will determine whether a roofmounted antenna or other network equipment can be deployed in a cost-effective manner at the requesting party's premises to provide service;

Third, it will determine whether reasonable adjustments at the nearest cell site can be made to provide service;

Fourth, it will determine whether a cell extender or repeater can be employed in a cost-effective manner to provide service;

Fifth, it will determine whether there are any other reasonable adjustments to the network or customer facilities which can be made to provide service;

Sixth, Easterbrooke will explore the possibility of offering the resold services of carriers that have facilities available to that location; and

Seventh, Easterbrooke will determine whether an additional cell site can be constructed to provide service, and evaluate the costs and benefits of using scarce high-cost support to serve the number of persons or parties requesting service through such additional cell site. If there is no possibility of providing service short of constructing a new cell site, Easterbrooke will report this fact the Commission, for informational purposes, along with the projected costs of construction and Easterbrooke's determination as to whether the request for service is reasonable and whether highcost funds should be expended on the request.

- B. Easterbrooke agrees to periodically identify for the Staff and CAD unserved areas within its ETC designated service areas and to inform the Staff and CAD of its plans for the deployment of wireless facilities in its service territory.
- C. Easterbrooke agrees to file with the Commission copies of its terms and conditions of service, and to provide the Commission, on an informational basis, a copy of its rate plans, including its Tel-Assistance, Link-Up and Lifeline discounts available to qualifying low-income customers; and
- D. Easterbrooke agrees to file annually with the Commission information as required by the Commission in order to certify compliance with 47 U.S.C. \$254(e). Such information shall include the amount of federal universal service funding received by Easterbrooke during the previous year and a statement of how such funds were spent or invested in compliance with 47 U.S.C. \$254(e).

The parties reached no agreement regarding whether Easterbrooke offered access to the public telephone network or whether designating Easterbrooke as an ETC in Frontier's service area is in the public interest. Finally, except for the extent to which the parties have agreed to a different condition in the Stipulation, the parties agreed that they will be bound by the final, non-reviewable decision in <u>Highland Cellular</u>, Inc., Case No. 02-01453-T-PC, with respect to the following issues:

- A. Whether Easterbrooke will be required to comply with the conditions that Frontier has proposed to apply to Easterbrooke. Those conditions, which are the same as Frontier proposed in <u>Highland Cellular</u>, <u>Inc.</u>, are:
  - 1. provide equal access;

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- 2. comply with the Winfield Plan;
- 3. comply with the <u>Rules and Regulations</u> for the <u>Government of Telephone Utilities</u>, including those rules from which wireless carriers are otherwise exempt, especially those in Section 2 of the Rules;
- file informational tariffs, and post them on its web site;
- 5. reduce rates by the amount of perline USF monies received, or in the alter-

native, use all USF monies received for incremental capital investment, or a combination of the two;

- 6. submit to annual Commission review of how USF receipts were used, including a review of infrastructure development plans;
- 7. take all necessary steps to provide service to all consumers who make reasonable requests by modifying or building out the wireless network or by providing service using wireline or other technologies, including through resale and the use of unbundled network elements, as necessary; and
- 8. the designation exists only as long as ILECs' universal service receipts are not reduced when an additional ETC is designated in their study areas.
- B. Whether Easterbrooke's designated service area lawfully may be less than the entirety of each Frontier study area in which it is designated as an ETC. More specifically:
- 1. If the final, non-reviewable decision in <a href="Highland Cellular">Highland Cellular</a>, Inc., provides that Highland must serve whole Frontier study areas, then Easterbrooke must serve the entirety of each Frontier study area in which it is designated as an ETC; and
- 2. If the final, non-reviewable decision in Highland Cellular, Inc., provides that Highland is not required to serve whole Frontier study areas, then Easterbrooke will not be required to serve the entirety of each Frontier study area in which it is designated as an ETC. In such case, Easterbrooke may be designated to serve an area to be determined by the Commission, subject to concurrence by the FCC pursuant to 47 C.F.R. §54.207(b) and (c).

Finally, the Joint Stipulation and Agreement for Partial Settlement provided that any designation of Easterbrooke as an ETC in Frontier's service area will become effective following both the issuance of a final, non-reviewable decision in the <u>Highland Cellular</u> case and the issuance, if necessary, under 47 U.S.C. §214(e)(5) and 47 C.F.R. §54.207(c) of an FCC order concurring in the Commission's proposed designated service area for Easterbrooke.

The first witness to present testimony was Tim McGaw, Vice President of Easterbrooke and President of Douglas Telecommunications, Inc. (DTI). Mr. McGaw has been associated with Easterbrooke since 1999. He has been

President of DTI since its inception in 1995. He also served as Executive Vice President of Rural Cellular Management Company from 1991 to 1995, which was a predecessor in interest to DTI. (Easterbrooke Exhibit 1, p. 2). According to Mr. McGaw, DTI employees manage the conduct of Easterbrooke's cellular radio system operations and network in West Virginia. The majority of the DTI employees live and work in West Virginia Rural Service Area 5 (WV RSA 5), the designation of the specified service territory for which the FCC granted Easterbrooke a (Easterbrooke Exhibit 1, p. 2). cellular license. Easterbrooke was established in 1990 and is an authorized wireless cellular carrier operating in West Virginia. It is also a telecommunications carrier as defined by the Communications Act of 1934, as amended. Easterbrooke provides service through its interconnection agreement with Verizon West Virginia Inc. which has been approved by the Public Service Commission. Easterbrooke is the original FCC licensee of WV RSA 5, designated by the FCC as Market No. 705, and encompassing Braxton, Clay, Nicholas, Randolph, Tucker, Upshur and Pocahontas, Webster Counties. Easterbrooke's cellular radio transmitters are licensed to operate under Call Sign KNKN739. As of December 2003, Easterbrooke had constructed 38 cell sites and will continue to add more sites as business conditions warrant. All of Easterbrooke's cell sites are connected by T-1 lines and microwave links to Easterbrooke's switch in Elkins, West Virginia, which in turn is connected to the public switched telephone network (PSTN), pursuant to Easterbrooke's interconnection agreement with Verizon. (Easterbrooke Exhibit 1, p. 3).

According to Mr. McGaw, Easterbrooke's network utilizes Nortel Time Division Multiple Access (TDMA) 850 MHz technology, with digital and anilog channels being supported. Easterbrooke is continuing to upgrade its switch to offer customers the latest telecommunications features. Its switch is designed to support network expansion and easily accommodates additional cell sites. Easterbrooke plans to further expand its coverage and service offers to out of its licensed service area. In 2004, Easterbrooke intends to install and activate a Global System for Mobile Communications (GSM) technology switch in Summersville, West Virginia, which will bring enhanced capabilities, including high-speed data offerings, to WV RSA 5. (Easterbrooke Exhibit 1, p. 3).

As Mr. McGaw explained, the eight-county area which makes up WV RSA 5 features some of the most mountainous and topographically diverse terrain in the entire state. Major primary and second highways in RSA 5 include Interstate 79 and Highways 19, 219 and 33. He explained that the economy in this market area is driven by recreation, logging, coal, tourism, service and light industrial occupations. He further explained that the topography, the relatively modest income levels and significant poverty in that geography region all pose challenges to Easterbrooke's efforts to satisfy its coverage and service objectives. (Easterbrooke Exhibit 1, p. 3). Easterbrooke has already been designated as an ETC by the Public Service Commission for wire centers served by Verizon which lie within Easterbrooke's service territory. Easterbrooke is now requesting ETC status for its remaining authorized service territory, which is served by Frontier, a rural telephone company (RTC). Exhibit A attached to Mr. McGaw's testimony indicates the boundary of WV RSA 5 and the area for the proposed ETC designation.

Mr. McGaw explained that Easterbrooke is seeking ETC status to enhance its network through the operation of additional cell sites, to provide customers with advanced services and the highest quality of service and to provide competitive telecommunications services in rural West Virginia. Easterbrooke believes that, with USF funding, it will be able to greatly improve its service in rural or remote areas and reduce or eliminate "dead spots" in its current communications coverage, which occur due to terrain or propagation characteristics, by constructing new cells and installing repeaters and extenders, as well as incorporating emerging or innovative technologies. Mr. McGaw noted that Easterbrooke and its customers currently pay into the Universal Service Fund and Easterbrooke's customers deserve to take advantage of the benefits that USF support provides. The incumbent local exchange carriers (ILECs) and their customers have already begun to experience the benefits of highcost support and he believes that Easterbrooke deserves similar support so that it may bring competitive wireless services to areas not currently served by a wireless carrier or to areas where landline service is unavailable. (Easterbrooke Exhibit 1, pp. 4-5).

According to Mr. McGaw, Easterbrooke provides coverage within its licensed service area consistent with applicable ETC requirements. Easterbrooke is the Frequency Block A cellular licensee for WV RSA 5. The eight counties within the RSA encompass 4,814 square miles, or nearly 20% of the entire state. Easterbrooke engineers its system for hand-held coverage, -85 dBmW or better. Nevertheless, subscriber proximity and handset wattage will impact service quality. Easterbrooke is seeking USF funding to continue to expand and improve its network through the establishment of additional cell sites. A map showing the areas where Easterbrooke is currently providing coverage with the signal strength of -85 dBmW or better was attached to Mr. McGaw's testimony as Exhibit B. (Easterbrooke Exhibit 1, p. 5 and Exhibit B).

In attempting to expand its coverage in WV RSA 5, Easterbrooke has to address certain engineering and financial challenges proposed by the existence of the National Radio Quite Zone (Quite Zone), established by the FCC in 1958 and which is centered around Green Bank, West Virginia. The Quite Zone encompasses an area of approximately 13,000 square miles in Virginia and West Virginia. The purpose of the Quite Zone is to minimize possible harmful interference with the National Radio Astronomy Observatory, located at Green Bank, West Virginia, and the Naval Radio Observatory, located at Sugar Grove, West Research Virginia. (Easterbrooke Exhibit 1, pp. 5-6).

FCC rules require that the National Radio Astronomy Observatory be informed of any proposed construction and the operation of new or modified radio transmission sites in the Quite Zone. Quite Zone restrictions generally result in reduced "effective radiated power" for sites that are approved for transmission. Restrictions also impact location and antenna configurations, because some sites are nearly unbuildable. The net result for CMRS carriers affected by the Quite Zone is to significantly increase coverage costs beyond what they otherwise would be and to significantly reduce signal strength, resulting in reduced service capabilities in that area. At one time, the FCC's rules governing operations in the Quite Zone prevented Easterbrooke from offering service to approximately 67% of its RSA. In an effort to cover

as much of its licensed area as possible, Easterbrooke, in concert with United States Cellular Corporation, filed a petition for rulemaking with the FCC on May 4, 1995. The FCC denied the petition on February 9, 2000, but, instead, granted both Easterbrooke and United States Cellular Corporation a waiver of certain FCC network build-out requirements. The waiver enabled Easterbrooke to construct facilities within the Quite Zone beyond the expiration of the five-year build-out period and afforded it time to address the unique engineering and financial challenges that the Quite Zone poses. Easterbrooke was not obligated to take measures to expand construction within the Quite Zone, but it nonetheless petitioned the FCC to do so, to insure that it could satisfy customer demand for service in that area. (Easterbrooke Exhibit 1, pp. 6-7).

Mr. McGaw explained that Easterbrooke intends to use its USF support for the provision, maintenance and upgrade of its facilities and services pursuant to Section 254(e) of the Communications Act of 1934, as amended.1 With USF support, Easterbrooke will be able to construct new facilities in rural high-cost areas and improve service in those areas in West Virginia where signal strength is weak due to topography. An improved telecommunications infrastructure will facilitate commercial residential development in sparsely populated areas and spur economic It will also promote more efficient operations and, eventually, lower the amount of high-cost support that carriers receive, which, in turn, will preserve the USF mechanism. (Easterbrooke Exhibit 1, p. 7). Mr. McGaw stated that Easterbrooke also will use USF support to extend emergency services (911 and E911) to remote areas, thus promoting public health and safety. Easterbrooke's system is designed to link 911 calls from the cell site where they originate to a public safety answering point (PSAP), from which point the PSAP will handle the call. Easterbrooke is compliant with Phase I E911 requirements and is poised to meet its Phase I obligations. Easterbrooke is also prepared to meet Phase II E911 requirements. According to Mr. McGaw, where this service is available, consumers that are stranded on local highways can access emergency services on a wireless phone, an option that local exchange carriers cannot provide, and can take advantage of roaming features when With USF funding, Easterbrooke can provide customers with adequate signal strength during emergencies. (Easterbrooke Exhibit 1, pp. 7-8).

Mr. McGaw explained that Easterbrooke can and does offer the nine services that are supported by the Federal Universal Service Mechanism under Section 254(c) of the Act and it will advertise the availability of those services using media of general distribution, in accordance with Section 214(e)(1) of the Act. According to Mr. McGaw, Easterbrooke provides voice grade access to the PSTN through its existing T-1 facilities connected to Verizon; provides local usage through its existing T-1 facilities connected to Verizon; offers dual tone multifrequency signaling through its Nortel DMS-100 switch; is able to provide a single-party service functional equivalent through the use of its licensed wireless spectrum; provides access to local emergency services

¹The sections of the amended Communications Act of 1934 at issue in this proceeding were all part of the Telecommunications Act of 1996 (TA-96). Different witnesses refer to the 1934 Act or TA-96 as the Act.

through its existing facilities; provides access to operator services through its interconnection agreement with Verizon; provides access to interexchange services through its agreement with Qwest; routes calls to directory assistance through its interconnection agreement with Verizon; and provides toll-limitation services for qualifying low-income custom-Additionally, Easterbrooke plans to provide Lifeline and Link-Up services to eligible low-income subscribers. Easterbrooke intends to offer a Lifeline rate plan that will provide a "bucket" of local (8county) minutes for a low monthly access rate. Subscribers will be able to call anywhere in the West Virginia 304 area code and make calls outside of that area, which would reduce the permissible "bucket of minutes" at its specified rate per minute. Subscribers could also elect to restrict toll calls. Easterbrooke's Link-Up rate plan will offer a price reduction of 50% of the normal activation fee (generally \$25.00) to eligible subscribers. Eligible subscribers must meet Lifeline eligibility requirements and the Link-Up reduction will apply to only one line per subscriber. (Easterbrooke Exhibit 1, pp. 8-9).

Mr. McGaw explained that Easterbrooke offers a variety of services and rate plans. It services offers include call waiting, call forwarding, three-way conference calling, detailed billing and voice mail. Easterbrooke currently has more than 100 different rate plans in effect, but it is constantly updating its offerings to reflect new promotions. Mr. McGaw identified and described four general categories of plans that have been available to Easterbrooke customers for the past eighteen months and are currently subscribed to by the majority of its customers. The Home Advantage Plan Category incorporates seven plans. The lowestpriced plan, available for \$19.95 per month, provides 200 anytime minutes and 500 night and weekend minutes per month and allows for one companion line. The highest-priced plan, available for \$139.95 per month, provides 2750 anytime minutes and 4,000 night and weekend minutes and allows for two companion lines. The home calling area for this category includes the eight counties in central West Virginia which make up WV RSA 5. Calls placed within the home area to anywhere in West Virginia incur no additional toll or long distance charges. Off-network roaming charges of \$0.25 to \$0.40 per call in West Virginia and \$0.90 per call outside of West Virginia (plus toll charges) are also applicable. (Easterbrooke Exhibit 1, p. 9).

The StatePlus Plan Category includes 4 plans. The lowest-priced plan cost \$29.95 per month and offers 300 anytime minutes, 1000 home weekend minutes for the main line and 400 home weekend minutes for a companion line, with a maximum of one companion line. The highest-priced plan costs \$79.95 per month and offers 700 anytime minutes, 4000 home weekend minutes for the main line and 500 home weekend minutes for companion lines, with a maximum of two companion lines. The calling area includes all of West Virginia plus nine counties in Ohio, Kentucky and Maryland. A customer can originate or terminate a call in these areas without incurring toll charges. Off-network roaming charges of \$0.60 per call (plus toll charges) apply. The Digital Freedom Category includes five plans ranging in price and minutes from \$25.00 for 100 anytime minutes per month to \$90.00 for 1000 anytime minutes per month with different maximum numbers of companion lines. The calling area includes twenty-six states east of the Mississippi River plus Washington D.C. and the customer can originate or terminate a call anywhere in the United States without incurring toll charges. Off-network roaming charges of \$0.60 per call apply. Finally, the Digital U.S.A. Category offers five plans ranging from \$28.00 for 100 anytime minute per month to \$128.00 for 1000 anytime minutes per month, again with varying numbers of companion lines. A customer can originate or terminate a call under these plans anywhere in the United States without incurring roaming or long distance charges. (Easterbrooke Exhibit 1, pp. 9-10).

According to Mr. McGaw, Easterbrooke is one of only a few independent cellular operators remaining in the United States. Easterbrooke's focus is solely WV RSA 5. It offers local services and calling plans that are tailored to local needs, which distinguishes it from national and regional carriers. Unlike ILECs, Easterbrooke can offer a large home calling area, even under its lowest-priced plan. Mr. McGaw believes that Easterbrooke's calling plans and service offerings can provide a viable alternative or adjunct to local exchange service. Additionally, Easterbrooke can offer quality and affordable services to consumers in areas where landline service is unavailable. (Easterbrooke Exhibit 1, p. 11).

Mr. McGaw believes that designating Easterbrooke as an ETC in the Frontier wire centers is in the public interest. The entry of a new provider of telecommunications services into the market currently dominated by an ILEC, such as Frontier, will motivate both the wireless and the wireline entities in that geographic region to work toward continued improvement and enhancement of their service offerings and lower prices, all of which will benefit consumers. The designation of Easterbrooke as an ETC in the portions of Frontier's study area which are co-terminous with Easterbrooke's RSA will not cause any reduction in the USF support that Frontier currently receives. Instead, it will simply encourage the introduction of improved service and pricing options by both companies, which also will benefit the public interest. Mr. McGaw believes that an ETC designation for Easterbrooke would enhance the value of the entire telephone network in West Virginia. (Easterbrooke Exhibit 1, p. 11).

Mr. McGaw also explained that, with USF support, Easterbrooke could provide consumers with a viable alternative to local exchange service. Customers would have the option of choosing wireless service as their primary means of communication and could select a rate plan and services that best meet their needs. Consumers will also benefit from improved technologies and longer battery life. Mr. McGaw believes that the availability of affordable high-quality wireless service is especially important to promote health and safety in rural areas where wireline physically unavailable. Mr. McGaw testified that services is Easterbrooke is committed to expanding its coverage and providing the best possible service for its customers, which he believes is demonstrated by Easterbrooke's attempts to amend the FCC's cellular build-out and unserved area rules to facilitate construction in the Quite Zone, although there was no federal requirement that it do so. USF funding will allow Easterbrooke to build a more robust network that will provide consumers with more reliable and comprehensive service. (Easterbrooke Exhibit 1, p. 12).

Mr. McGaw also discussed Easterbrooke's reliability. According to Mr. McGaw, the call completion rate for consecutive Fridays over an eight-week period in October and November 2003 was 98.58%, or a 1.42% blocking rate. Easterbrooke's performance was well within the industry's standards for call blocking. In the event of a major electrical outage, all of Easterbrooke's cell sites are equipped with battery backup which can provide eight hours of power and/or a generator that can run unattended for six days or 150 hours. Cell sites are routinely mainusually of and outages are rare and short Easterbrooke's WV RSA 5 switch has never experienced an unplanned outage and the planned down-time for periodic maintenance is rare. extent that outages do occur, they usually result from an external event, such as a lighting strike or wind damage, and are attended to immediately. Easterbrooke utilizes an alarm monitoring system that pages the on-duty technician and alerts management. Mr. McGaw testified that current and prospective customers can contact customer service toll-free during regular business hours or by dialing 611 from a wireless phone. If the customer is making the call from a wireless phone or calling from his home area, the call is free. Customers can also seek assistance by e-mail or in person by visiting retail stores in Elkins, Buckhannon or Summersville, West Virginia. Easterbrooke customers also are allowed to choose from a variety of anilog or digital handheld and transportable phones. (Easterbrooke Exhibit 1, pp. 12-13).

Mr. McGaw testified that Easterbrooke will insure that it can provide service upon request from customers, whether the request comes from customers located outside of its signal coverage area or within its coverage area who simply cannot receive an adequate signal. It intends to use its federal support to improve service for as many of its customers as possible and to provide service to as many requesting customers as possible. If a customer within Easterbrooke's existing network makes a service request, Easterbrooke will provide service immediately. If a request is generated by a customer within Easterbrooke's authorized service area who is not receiving service, initiate steps to provide service, Easterbrooke will (1) modifying or replacing equipment; (2) deploying a roof-mounted antenna or other network equipment; (3) making adjustments to the nearest cell site; (4) employing a cell extender or repeater; (5) adjusting network or customer facilities; (6) providing resold services of other carriers that have available facilities; or (7) determining whether an additional cell site can be constructed to provide service, and evaluating the cost and benefits of using high-cost support to serve parties through that additional cell site. According to Mr. McGaw, if there is no possibility of providing service short of constructing a new cell site, Easterbrooke will submit the projected cost of construction, and its determinations as to whether the request for service is reasonable and whether high-cost funds should be expended to satisfy the request, to the Public Service Commission for review. (Easterbrooke Exhibit 1, pp. 13-14).

On cross-examination, Mr. McGaw further explained that, with Universal Service funds, Easterbrooke can build out or expand its infrastructure in order to expand the service it provides in its licensed service area. He further explained that, between 2001 and 2003, Easterbrooke has spent between 3.4 million dollars and 4.9 million

dollars per year in infrastructure investment. The expenditures have tended to increased in recent years. (Tr., pp. 21-22). In 2004, Easterbrooke's capital expenditures will be the highest ever, partly associated with the addition of the GSM Switch in Summersville. Mr. McGaw has no problem with committing to use Universal Service funds as an incremental investment over and above Easterbrooke's historical capital expenditures. (Tr., p. 22). Mr. McGaw believes that Easterbrooke will probably have a need for more infrastructure investment than it has in the past. (Tr., pp. 23-24).

Currently, Easterbrooke has 39 cell towers in its service area and is working to install five (5) more in 2004. Easterbrooke wants to build as many towers as can be financed. Mr. McGaw doesn't know how many towers Easterbrooke would construct in its first year after obtaining eligible telecommunications carrier designation. (Tr., p. 24). He explained that, on average, including the cost of acquiring rights to property to put up a tower, it costs approximately \$250,000 to \$300,000 to actually build a cell tower. The vast majority of Easterbrooke's towers were constructed by Easterbrooke, not co-located. (Tr., pp. 24-25). In the Joint Stipulation and Agreement for Partial Settlement, Easterbrooke committed to work with Staff and the CAD to review its Universal Service Fund expenditures. (Tr., p. 25).

Mr. McGaw stated that Easterbrooke has experienced cell tower outages since 1990. However, the situation has improved significantly as Easterbrooke has improved the fundamental backbone of its network. The primary cause of outages is probably microwave failure in terms of transmitting calls back to the switch. These outages are usually suffered in winter due to weather issues. Easterbrooke only experiences a couple of outages during a year. Mr. McCaw explained that the Easterbrooke system has a great deal of redundancy and, often, outages can be repaired rapidly, within five to six hours, although some take longer. Because of topography, there are not that many areas where one cell tower can pick up and transmit signals from a tower that is out of The Easterbrooke system is called a "string of pearls" structure, which means that Easterbrooke's towers are set more or less in a line, as compared to an urban environment, where a company might have four or five cell sites clustered together and where it might be possible for one tower to pick up transmissions from a tower that is suffering an outage. (Tr., pp. 25-27). Mr. McGaw testified that topography has a major impact in this market in particular. (Tr., p. 27).

Mr. McGaw explained that Easterbrooke has an interconnection agreement with Verizon, but does not have an interconnection with Frontier. The interconnection point between Easterbrooke and Verizon is at two "V" tandems, one in Clarksburg and the other either in Charleston or Summersville. (Tr., pp. 27-28). The Clarksburg tandem provides interconnection with Verizon in the northern (Clarksburg) LATA while the Charleston or Summerville tandem provides interconnection with Verizon in the southern (Charleston) LATA. (Tr., p. 28). According to Mr. McCaw, Easterbrooke hasn't requested an interconnection agreement with Frontier and Frontier hasn't requested one with Easterbrooke. (Tr., p. 31).

Mr. McGaw acknowledged that a cell tower outage would affect the provision of 911 service to customers who access that cell tower. If the

site is down, it's the same as if the site didn't exist. The same is true with dead spots. If a customer is mobile and making a call to 911, if the customer enters a dead spot, the customer could lose that call to 911. (Tr., p. 32). Mr. McGaw testified that Easterbrooke has never received complaints from any of its subscribers that they are unable to place calls to or receive calls from a Frontier customer using his or her Further, Frontier hasn't complained to Frontier landline phone. Easterbrooke that any Frontier customers have been unable to place calls to or receive calls from Easterbrooke customers using their Easterbrooke wireless phones. Frontier has never approached Easterbrooke to request that it enter into an interconnection agreement with Frontier. According to Mr. McGaw, there is no factor that he knows of preventing Frontier from requesting an interconnection agreement with Easterbrooke. McGaw further testified that Easterbrooke's lack of an interconnection agreement with Frontier does not preclude or impede Easterbrooke's ability to offer any of the nine supported services identified in Section 54.101 of the Federal Communications Commission's rules. (Tr., pp. 38-According to Mr. McGaw, a carrier like Easterbrooke could not possibly enter into an interconnection agreement with every ILEC in the country. He explained that the point of the public network is to avoid He further testified that Easterbrooke's receipt that problem. Universal Service Fund support will permit it to construct facilities in high cost sectors of its licensed service area. (Tr., p. 40).

According to Mr. McGaw, the high cost regions covered Easterbrooke's petition in this case are geographic regions that could be visited by persons who might live or work in the low cost centers of Easterbrooke's service areas. When people travel by car to the high cost areas they could get access from Easterbrooke to the nine Universal Service Fund supported services, even though they are not standing next to a Frontier landline telephone. Mr. McGaw believes that ETC designation for Easterbrooke is consistent with and in furtherance of the public interest, because of Easterbrooke's ability to expand its network and reach out to areas that previously had no coverage, which will then provide access to the nine supported services, plus others, to many more people. He further pointed out that landlines also suffer outages in bad weather and customers served by those landlines then cannot contact the 911 services. (Tr., pp. 40-42).

Mr. McGaw pointed out that Easterbrooke won't get a dime due to its eligible telecommunications carrier designation unless customers actually subscribe to its service. Easterbrooke does have an existing customer base, including customers in high-cost rural areas. Other carriers also may have existing customers in high-cost rural areas. The fact that Easterbrooke has an existing network and customers does not mean that it will continue to incrementally improve the network absent those Universal Service Funds. (Tr., pp. 43-44).

The next witness to present testimony in this proceeding was Don J. Wood, a principal in the firm of Wood and Wood, an economic and financial consulting firm in Georgia. Mr. Wood provides economic and regulatory analysis of the telecommunications, cable and other related industries with an emphasis on economic policy, competitive market development and cost-of-service issues. Mr. Wood has extensive experience in the telecommunications industry and has a scholastic background in finance

and macroeconomics from Emery University and the College of William and Mary. He has testified extensively before regulatory commissions in thirty-six states, the District of Columbia and Puerto Rico, as well as in state and federal courts and before the Federal Communications Commission. (Easterbrooke Exhibit 2A, pages 1-2 and attached Exhibit DJW-1). Mr. Wood is very familiar with the universal service mechanism. (Easterbrooke Exhibit 2A, pages 2-3).

Mr. Wood explained that granting eligible telecommunications carrier designation to Easterbrooke will provide benefits to customers in both the short term and the long term. Customers or/and users will benefit in the short term from having a choice of suppliers representing different technologies, which will allow them to choose the technology that best meets their needs. They will also be able to select from a broader array of service and pricing plans, again choosing a plan that best meets their individual needs. Over the long term, consumers will benefit as competitive market forces make all providers, including the incumbent local exchange carriers, more efficient and responsive to customer needs. Mr. Wood explained that the Federal Communications Commission has previously concluded that the entry of an additional eligible telecommunications carrier into a rural area can provide incentive to the incumbent to implement new operating efficiencies, lower prices and provide better service to its customers and that there was no merit in arguments that the designation of an additional eligible telecommunications carrier in a rural area would reduce investment incentives, increase prices or reduce the service quality of the incumbent local exchange carriers. (Easterbrooke Exhibit 2A, p. 5).

While Mr. Wood believes that the short term benefits of competitive entry, such as lower prices, new service offerings, the availability of different technology and the ability to diversify among suppliers are important, the long term economic benefits of competition represent an equally important source of potential gain for the consumers of telecommunications services in rural areas and for rural economic development. (Easterbrooke Exhibit 2A, pp. 5-6).

Mr. Wood believes that the existence of competitive alternatives in rural areas is more important than competition in urban or suburban areas for two reasons. First, the existence of competitive options for telecommunications services, particularly the availability of wireless service, is important for rural economic development. He explained that, when making decisions regarding investment or relocation, companies consider the availability of telecommunications services in a given area. Reliable voice services, data services and wireless services with sufficient coverage all play a role in this process. In order to compete with the urban and suburban areas to attract investment and jobs, rural (Easterbrooke Exhibit 2A, pp. areas must have these service available. Mr. Wood also explained that the availability of affordable and high quality wireless service is important in rural areas for health and safety reasons. He testified that reliable mobile communications have a level of importance for people who live and work in rural areas that people living in urban areas often fail to appreciate. The availability of the highest quality wireline service is no substitute for a mobile service with broad geographic coverage, simply because the wireline service is often physically not there when needed. In an area where

fields being worked are far from the road and where wireline phones along the roadway are few and far between, the availability of wireless communications can literally save a life. (Easterbrooke Exhibit 2A, p. 7).

Mr. Wood confirmed that customers of Easterbrooke services are able to make calls to Frontier customers, explaining that the ability of the customers served by each company to make calls to the customers of the other company will not change as a result of Easterbrooke's designation as an eligible telecommunications carrier. The existing network and interconnection agreement between Easterbrooke and Verizon will continue to be in place so the customers can make these calls. (Easterbrooke Exhibit 2A, p. 8).

Mr. Wood emphasized that, with respect to the public interest issue involved in designating an additional eligible telecommunications carrier in a rural telephone company area, it is the interest of the public, the consumers of telecommunications service, that must be considered. He believes that the interests of the individual carriers or categorizes of carriers are not significant elements in the public interest determination, which he believes is consistent with the FCC's stated policy of "competitive neutrality" in the rural universal service mechanism. (Easterbrooke Exhibit 2A, p. 9).

Mr. Wood testified that he has done economic development work in rural Georgia, which faces many of the same issues that are being faced by West Virginia. He testified that wireless communications represent the kind of infrastructure that businesses look at in terms decisions on where to locate or construct plants. A lot of companies are looking at wireless infrastructure, and specifically looking at high speed data service capability, when they make their decisions on construction or location. Mr. Wood believes that an investment in wireless infrastructure is an investment for everyone who lives and works in these areas. (Tr., pp. 50-51). He also emphasized the health and safety benefits for these areas because of the broader coverage of wireless service versus wireline services. All of these benefits are associated with investing in infrastructure. (Tr., pp. 51-52). While he acknowledged that the benefits of access to high speed services and alternative types of services could be true for any area, in urban areas that infrastructure is largely in place. It's not really in place in rural areas. In order to make rural areas attractive, the areas have to have the wireless infrastructure in place. He noted that these areas are already attractive to a degree because of land prices and the labor force, but more is required to allow them to compete with urban and suburban areas. (Tr., pp. 61-61). He emphasized that the need for network build-out is particularly true for rural areas. The current lack of choices and options in rural high cost areas makes it that much more of a benefit to build out a network in those areas. He believes that's really what's embodied in the Telecommunications Act of 1996, when one talks about opening rural markets and insuring service availability comparable to rural areas. (Tr., p. 62).

Mr. Wood agreed that, in some areas, Easterbrooke now competes with Frontier for customers. The receipt of Universal Service Funds would put Easterbrooke on a more equal footing and provide it with more of an

ability to provide a viable substitute service for more customers in more areas. For some customers, Easterbrooke can't compete now. For others, Easterbrooke will have to build out its network to be able to compete, just as it took time for Frontier to build out its own network. Where Easterbrooke has built its network out and has signal coverage, Easterbrooke is in competition with Frontier to provide local service to the customers in the area. If Easterbrooke obtains eligible telecommunications carrier designation, it will be in competition with Frontier to even a greater degree. (Tr., pp. 80-81).

The next witness to present direct testimony was J. Michael Swatts, the State Government of Affairs Directors for seven of Frontier's southeastern states, including West Virginia. Mr. Swatts has had an extensive telecommunications career, beginning with GTE and then, following Frontier's acquisition of the GTE properties in 1994, with Frontier. (Frontier Exhibit 2, pp. 2-3). Frontier is a local exchange carrier providing service to customers in thirty-four (34) of West Virginia's fifty-five (55) counties. It has three designated study areas, Bluefield, St. Mary's and Mountain State. Frontier is a rural telephone company or RTC in each of those study areas and has filed a Universal Service Fund disaggregation plan for each study area. Exhibit 3 attached to Frontier Exhibit 2 is a table prepared by Mr. Swatts showing the exchanges and counties included within each of the study along with the cost zone of each exchange under disaggregations plans. Frontier is the incumbent local exchange carrier and carrier of last resort in its three study areas and it has been designated as a eligible telecommunications carrier and receives Universal Service Funds in all three of its study areas. (Frontier Exhibit 2, pp. 4-5).

According to Mr. Swatts, Frontier exceeds the requirements for providing the nine services supported by the Federal Universal Service Fund throughout its three study areas. For example, Frontier provides equal access instead of just the required access to an interexchange carrier. This allows customers to select the long distance carrier they wish to use. Frontier also provides several calling plans, including unlimited local calling for a flat monthly fee within calling scopes defined in accordance with the Commission's long-standing Winfield plan. Frontier also exceeds the requirement to provide some form of toll limitation by offering several options. Customers can choose to block all direct-dialed toll calls or to selectively block other types of toll calls, such as 900 or 976 numbers. Frontier, also offers call screening services, which allow customers to regulate toll charges by blocking incoming collect calls and by preventing third-party billed calls from being charged to their account. Frontier also offers soft dial tone to customers during temporary disconnect periods so they will have access to 911 emergency services. All of Frontier's local exchange services are regulated by the Commission. (Frontier Exhibit 2, pp. 5-6).

Mr. Swatts explained that the Public Service Commission regulates Frontier in a number of ways, including regulating Frontier's rates through an incentive regulation plan (IRP) for Frontier. In each IRP, the Commission adjusts Frontier's rates and requires it to make certain types and amounts of investment in infrastructure. The Commission sometimes requires Frontier to extend existing services or provide new

services that Frontier would not otherwise be required to provide, as a condition of an IRP. The Commission also has adopted its <u>Rules and Regulations for the Government of Telephone Utilities</u>, which regulate Frontier's quality of service, impose certain reporting requirement and provide customer protections regarding disconnection of service and other things. The Commission also regulates Frontier through general orders and the tariff process. (Frontier Exhibit 2, pp. 6-7).

Mr. Swatts explained that Frontier voluntarily exceeds the minimum requirement established by the Federal Communications Commission for eligible telecommunications carriers, in some cases because it wants to provide high quality service to its customers or because it has agreed to do so as a condition of receiving other benefits in an IRP. Because of state regulatory requirements, however, Frontier has no choice but to exceed some of the Federal minimum requirements for eligible telecommunications carriers, such as the requirements to provide equal access and to comply with the Winfield plan. According to Mr. Swatts, all of the regulations and the provision of Universal Service funds to Frontier comply with the Winfield plan. insure that customers receive a consistently high quality of service at affordable rates. They also assure customers the ability to address service problems quickly and effectively and provide fair treatment of customers. (Frontier Exhibit 2, pp. 7-8).

Frontier's Universal Service Fund receipts effectively reduce the rates that Frontier otherwise would charge its customers. All incumbent local exchange carrier ETCs are subject to the full array of Commission regulations to which Frontier is subject, although the Commission uses rate of return regulation to regulate the rates of incumbents other than Frontier and Verizon. Wireline competitive local exchange carriers (CLECs) also are subject to these requirements, except that the Commission does not regulate their rates. However, Easterbrooke is not subject requirements. The Commission does not regulate these same Easterbrooke's rates and does not require Easterbrooke to file tariffs, provide equal access or comply with the Winfield plan. Additionally, the Commission's Telephone Rules exempt wireless carriers from some of their provisions, principally related to disconnection of service for nonpayment, deferred payment plans, the taking of deposits and other types of customer protections. (Frontier Exhibit 2, pp. 8-9).

According to Mr. Swatts, Easterbrooke does <u>not</u> compete with Frontier. Mr. Swatts doubts that Frontier's customers will be giving up their wireline phones even if they have a wireless phone. He explained that West Virginians who have wireless phones also tend to have a wireline phone and they use those two telephones for different purposes and in different ways. He believes that West Virginia consumers do not view wireless and wireline services to be substitutes or competitors. Therefore, in its strategic planning, Frontier does not consider wireless services and does not market in response to Easterbrooke's promotions, although it aggressively markets in response to competitive entry by carriers that offer substitute service, such as Hardy Telephone Company or Fibernet. (Frontier Exhibit 2, pp. 9-10).

Mr. Swatts is of the opinion that the service offered by Easterbrooke does not satisfy the minimum requirements for being an eligible telecommunications carrier. First, Easterbrooke has not entered

into an interconnection agreement with Frontier to exchange traffic in accordance with Section 251 of the Communications Act. Instead, it routes traffic to Frontier via tandems operated by Verizon, without paying Frontier reciprocal compensation. Mr. Swatts believes that, until Easterbrooke enters into an interconnection agreement with Frontier, it should not be considered to provide access to the public switched telephone network, which is one of the nine services Easterbrooke must provide in order to become an eligible telecommunications carrier. (Frontier Exhibit 2, p. 10). Further, Easterbrooke has no ability to provide the nine supported services in those portions of Frontier's study areas outside of its wireless licensed areas. It has not entered into an interconnection agreement with Frontier that would allow it to provide service outside of its wireless licensed service area and it neither offers nor advertises services in the part of Frontier's study areas that lie outside its wireless licensed area. (Frontier Exhibit 2, pp. 10-11).

Mr. Swatts is of the opinion that it is not in the public interest to designate Easterbrooke as an eligible telecommunications carrier in Frontier's study areas. Principally, he believes that it make no economic sense to provide universal service support to more than one area and one carrier in Frontier's study areas because those areas are costly to serve and each one qualifies for federal high cost support. According to Mr. Swatts, when a study area qualifies for high cost support, this constitutes an implicit finding that, but for the Universal Service Fund, quality telephone service would not be available in that area at rates comparable to those charged in urban areas. He believes that, if a study area cannot support even one carrier without Universal Service Funds, it make no economic or policy sense to support additional carriers in that He believes this is especially true because the customers ultimately provide the monies to go into the Universal Service Fund for (Frontier Exhibit 2, p. 11). According to Mr. Swatts, redistribution. the fundamental purpose of Universal Service Fund support is to insure that telephone service is available in high cost areas where otherwise there would be no service. That objective has already been achieved. He believes that Universal Service support should not be used simply to foster competition or insure the viability of a competitor. He arqued that, since Easterbrooke does not compete with Frontier, any Universal Service Fund support it receives presumably would be used to enable it to more effectively compete with other wireless carriers. According to Mr. Swatts, this is not an appropriate use of Universal Service Fund monies nor is it in the public interest. (Frontier Exhibit 2, pp. 11-12).

While Mr. Swatts acknowledged that it would be a good thing to have wireless services, and services such as high speed internet and other high speed data services, available everywhere in the state, doing so would require massive subsidies in the areas that Frontier services. He pointed out that Congress and the Federal Communications Commission have made the policy decision to allow the Federal Universal Service Fund to support only the nine specified services. Once those services are available in a high cost area at rates comparable to those charged in more urban areas, the Federal Universal Service Fund had fulfilled its obligation. He stated that, if the Public Service Commission wants to support additional services, it should consider the creation of a state Universal Service Fund to promote those policy goals. (Frontier Exhibit 2, p. 12).

According to Mr. Swatts, the areas served by Frontier in all three of its study areas are so costly to serve, that, without Universal Service Fund support, Frontier could not maintain its service quality level and rates. Rates would have to rise to a level that few, if any, of its customers would be willing to pay. According to Mr. Swatts, under Frontier's Universal Service Fund disaggregation plan, which targets Universal Service Fund monies to the most costly areas, some of Frontier's wire centers receive over \$100.00 of support per line per month. (Frontier Exhibit 2, p. 13).

Mr. Swatts testified that there are also other reasons why designating Easterbrooke as an eligible telecommunications carrier in Frontier's study areas is not in the public interest. According to Mr. Swatts, providing Universal Service Fund monies to Easterbrooke will provide it Universal Service Fund support only recently became with a windfall. available to wireless carriers. However, their business plans were established and their rates were set without reliance on or the expectation of receiving Universal Service Funds. Therefore, giving them Universal Service Fund support is a windfall. (Frontier Exhibit 2, p. 13). Additionally, Easterbrooke and other wireless carriers licensed to service rural areas have an ability to cream skin or arbitrage the Universal Service Fund mechanism by obtaining too much Universal Service Fund support relative to the areas they serve and their costs. believes this is possible because additional eligible telecommunications carriers receive the same amount of Universal Service funding that Frontier receives on a per-line basis. This per-line amount is based on the billing address of the customer. Further, Easterbrooke's service is Thus, these factors together allow Easterbrooke to receive support that is targeted to the highest-cost areas while actually providing service in the lowest-cost areas. Mr. Swatts believes that this is an unavoidable outcome given the mobile nature of Easterbrooke's service. Further, Easterbrooke would receive support based on the costs of wireline technology, which is generally higher than wireless technol-(Frontier Exhibit 2, page 14). ogy.

According to Mr. Swatts, Frontier's disaggregation plan did not solve the cream skimming problem with respect to wireless carriers. Frontier's plan targets its Universal Service Fund receipts so that most of the support goes to the highest-cost areas to serve, where, he believes, Easterbrooke is least likely to have signal coverage, while little or no support is targeted to the lower-cost portions of Frontier's service area, which is where Easterbrooke is most likely to have signal coverage. Whenever Easterbrooke signs up a customer who lives in a highcost wire center, it receives the amount of support targeted to that wire center, even if it only provides service to the customer when he or she visits a low-cost area where there is signal coverage. asserted that Frontier was not suggesting that Easterbrooke had any ill intent, but Frontier believes that the cream skimming and windfall problems occur as a result of the inherently mobile nature of wireless service. Because of the mobile nature of wireless service, customers who have no coverage at their billing address often buy wireless service anyway in order to be able to use it away from home. Mr. Swatts also argued that few wireless customers use their wireless service at home, which will unavoidably result in cream skimming or arbitrage. (Frontier Exhibit 2, pp. 14-15).

Mr. Swatts also argued that it is not in the public interest to designate Easterbrooke as an eligible telecommunications carrier in Frontier's study areas because Easterbrooke does not provide equal access, does not comply with the Winfield plan and is exempt from portions of the Commission's <u>Telephone Rules</u>, particularly key consumer protection rules related to discontinuation of service and other issues. He also again mentioned that Frontier believes that Easterbrooke is obligated to enter into an interconnection agreement with Frontier for the mutual exchange of traffic and to pay reciprocal compensation for that traffic exchange. He argued that, until Easterbrooke fulfills its interconnection obligations, it is not in the public interest to designate it as an eligible telecommunications carrier. (Frontier Exhibit 2, pp. 15-16).

Mr. Swatts also denied that the benefits of competitive entry by Easterbrooke were sufficient to support a public interest finding in this case. He again argued that Easterbrooke does not compete with Frontier, but, rather, competes only with other wireless carriers. Service Fund monies he argues are provided for the purpose of fostering competition. Universal Service was intended to insure that people in all areas of the nation would have quality telephone service at affordable rates, by providing carriers a method of cost recovery other than user rates. The goal was to insure that telephone service was available where otherwise there would be none because it would cost too much to provide While the Telecommunications Act of 1996 did introduce competition and permit additional eligible telecommunications carriers to receive Universal Service Funds, he argued that no one, other than wireless carriers, is suggesting that Universal Service support is to be used to promote competition. He argued that the Federal Communications Commission is beginning to step away from its previous position that the goal of promoting competition was enough to satisfy the public interest test. (Frontier Exhibit 2, pp. 16-17).

Mr. Swatts argued that, if the Commission decides to designate Easterbrooke as an eligible telecommunications carrier, it should condition that designation on Easterbrooke having to provide equal access; comply with the Winfield plan; comply with the Commission's Telephone Rules; file informational tariffs and post them on its website; reduce rates by the amount of per-line Universal Service Fund monies received, or, in the alternative, use all Universal Service Fund monies received for incremental capital investment or a combination of the two; submit to annual Commission review of how its Universal Service Fund receipts were used, including a review of its infrastructure development plan; take all necessary steps to provide service to all customers who make reasonable requests, by modifying or building out the wireless network or by providing service using wireline or other technologies, including resale and the use of unbundled network elements; and the designation would exist only as long as the incumbent local exchange carrier's Universal Service Fund receipts are not reduced when an additional eligible telecommunications carrier is designated in its study area(s). (Frontier Exhibit 2, pp. 18-19).

Mr. Swatts testified that these conditions do not create greater burdens on Easterbrooke than those applied to other eligible telecommunications carriers in West Virginia, but, instead, are far less than those

faced by other eligible telecommunications carriers in West Virginia. He noted that Frontier and the other incumbent local exchange carrier ETCs are subject to rate regulation and greater tariff requirements, while competitive local exchange carrier ETCs are also subject to tarriffing requirements, although they are not rate regulated. (Frontier Exhibit 2, p. 19). Frontier is not suggesting that Easterbrook's rates be regulated, because federal law prevents states from regulating the rates of wireless carriers. Further, since the Commission does not regulate the rates of CLECs, Frontier does not believe the full rate regulation of wireless carriers is critical. However, in order to insure that Easterbrooke does not get a windfall from its ETC designation, Frontier has suggested that the Commission require Easterbrooke to reduce its existing rates by the amount of Universal Service support it receives, which will insure that its rates take into account the fact that it is receiving Universal Service Funds. (Frontier Exhibit 2, pp. 19-20). As an alternative, Frontier believes that infrastructure investment is another acceptable use of Universal Service Funds by ETCs. Easterbrooke could use those funds to build out its network and improve signal coverage. (Frontier Exhibit 2, p. 20).

Mr. Swatts noted that each ETC must annually obtain from the Public Service Commission a certification that it is properly using its Universal Service Fund receipts. This certification must be filed with the FCC and the Universal Service Administrative Company (USAC). If the certification is not filed, the ETC does not receive future USF support. Mr. Swatts believes that this certification will provide the Commission with an opportunity to police and enforce the conditions it imposes upon the use of USF support by Easterbrooke. If necessary, the Commission can revoke Easterbrooke's ETC designation if it found that Easterbrooke is not in compliance with the designation. (Frontier Exhibit 2, pp. 20-21).

Frontier does not believe that its conditions create a barrier to entry or have the effect of creating a barrier to entry. Mr. Swatts noted that Easterbrooke has been providing service in a Frontier's study areas for years. Conditioning Easterbrooke's ETC designation on certain conditions does not prevent or impede it from providing service. Further, Easterbrooke obtained its cellular licenses and began providing service years before Universal Service Funds became available to wireless carriers. Mr. Swatts believe it is illogical to claim that not allowing it to have access to Universal Service Fund support now is somehow a barrier to entry. (Frontier Exhibit 2, p. 22).

In conclusion, Mr. Swatts testified that the conditions he proposed only reduce, but do not eliminate, the public interest harms that will result from designating Easterbrooke as an ETC in Frontier's study areas. Even with those conditions, he believes that it is not in the public interest to designate Easterbrooke as an ETC in Frontier's study areas. Frontier proposed those conditions simply to reduce the harm that will result if the Commission decides to designate Easterbrooke as an ETC in Frontier's study areas. (Frontier Exhibit 2, pp. 23-24).

Mr. Swatts, during his testimony on the stand, explained that Frontier was not willing to stipulate that Easterbrooke provides access to the PSTN because it is Frontier's understanding that its customers in the study areas don't have the ability to call Easterbrooke's cellular

numbers sometimes in the manner that they should be able to dial those There are some Frontier exchanges that numbers. are Easterbrooke's Elkins switch, but which didn't have Easterbrooke's calling codes open and, therefore, Frontier's customers are not able to make local calls where they should be able to in some cases. He explained that, typically, when a new code is opened outside of Frontier's service territory, but local to its exchanges, the carrier that opens the code calls Frontier and asks that it be opened. If Frontier isn't notified by the carrier and Frontier ultimately finds out that the code is not available through a complaint filed by a Frontier customer, Frontier will contact the carrier and they work out an appropriate interconnection agreement. However, Frontier hasn't received any complaints from its customers about not being able to access any Easterbrooke telephone numbers. (Tr., pp. 135-137). He acknowledged that customers are making those calls to the Elkins switch, so the calls are getting through, but the codes should be opened in Frontier's switches as local calls and not long distance calls. Mr. Swatts again acknowledged that Frontier's data base people are unaware of any complaints regarding this issue and he had spoken to them the morning of the hearing. (Tr., p. 140).

Mr. Swatts testified that he did not compare Easterbrooke's rate plans to Frontier's rate plans. He again testified that Easterbrooke is not a competitor of Frontier. At this time, Frontier views wireless providers as supplemental services. Easterbrooke is not seeking ETC designation in Frontier's Bluefield study area. (Tr., pp. 142-143).

The first rebuttal testimony was presented by Mr. Wood on behalf of Easterbrooke. Mr. Wood responded to the direct testimony prepared by Frontier's witness Swatts. In summary, Mr. Wood believes that Mr. Swatts' arguments are unsupported by either facts or sound public policy and have explicitly rejected by State regulators, the FCC or both. (Easterbrooke Exhibit 2B, p. 4). Mr. Wood argued that Mr. Swatts devoted the bulk of his testimony to a discussion of broad policy issues that are beyond the scope of this proceeding. Mr. Wood again emphasized that it is the interest of the public that must be considered, while the interests of individual carriers or categories of carriers are secondary considerations, if they are to be considered at all, in determining whether or not to designate an additional ETC in a service territory. (Easterbrooke Exhibit 2B, p. 6). Mr. Wood also argued that opening telecommunications markets to competition, including rural areas, is one of the explicit objectives of the Telecommunications Act of 1996, including Section 254. Mr. Wood asserted that Mr. Swatts' argument that, if one carrier already offers basic services in the subject market there is no need to make additional USF support available in that region, is off the mark and in violation of the Telecommunications Act of 1996. (Easterbrooke Exhibit 2B, pp. 7-8).

Mr. Wood pointed out that Mr. Swatts provided no specific facts related to any of Frontier's rural ILEC service areas that would justify rejection of Easterbrooke's petition. He argued that Frontier offered no facts that would support a decision that it is not in the public interest to designate Easterbrooke as an ETC in Frontier's study areas. (Frontier Exhibit 2B, p. 9).

Mr. Wood testified that he had no problem with the application of a cost-benefit analysis in this proceeding, as long as both the benefits and costs considered are specific to this proceeding. He noted that Easterbrooke presented facts that are specific to its West Virginia service area and operations. In contrast, Mr. Swatts argued that the costs to be examined include the impact on the size of the Federal fund, the impact of supporting multiple networks and whether or not wireless and wireline services are substitutes. (Easterbrooke Exhibit 2B, pp. 9-10).

Mr. Wood believes that the Commission should apply the same standard in this proceeding that it has applied when it reviewed other ETC applications. He noted that other State regulators have chosen to consider the FCC's investigation of an ETC petition filed by RCC Holdings in Alabama as a template for their own public interest analysis. That case represented an instance where the FCC applied its own standard and described in detail the scope of the facts considered and the reasoning behind its decision. The FCC included a description of the benefits that it believed rural consumers would receive as a result of the designation of RCC Holdings as an ETC, but it did not include the broad speculation about potential costs considered essential by Mr. Swatts. (Easterbrooke Exhibit 2B, pp. 11-12).

Mr. Wood reiterated that the people who live and work in the rural areas that are the subject of Easterbrooke's application will benefit from its designation as an ETC. He noted that Easterbrooke has made the commitment to offer and advertise the nine supported services throughout its service territory. Easterbrooke will provide residences and businesses in the specified areas with important options. End users will be able to choose the technology, either wireline or wireless, that best meets their individual needs and will be able to choose between rate plans that will allow them to closely match the service they receive with their calling patterns and frequency. Further, end users will have greater access to the personal and public safety benefits of wireless service. (Easterbrooke Exhibit 2B, pp. 12-13). Mr. Wood stated that there is nothing in the service territory in which Easterbrooke is seeking ETC designation that would outweigh the benefits to be gained from ETC designation. (Easterbrooke Exhibit 2B, pp. 13-14). Mr. Wood argued that, despite Frontier's claims, one of the main goals of the Telecommunications Act of 1996, and subsequent FCC Orders, was to facilitate the entry of competitive carriers to rural, insular and high cost areas so that customers would have meaningful competitive choices, which would further the goal of rural/urban parity. He noted that this ETC proceeding is precisely about facilitating that kind of competition. (Easterbrooke Exhibit 2B, p. 15).

Mr. Wood also argued that Mr. Swatts' observation that customers have historically not substituted wireless service for wireline service in rural areas is a poor predictor of the future. First, the previous levels of coverage and service quality provided by wireless carriers, prior to receiving any USF support, were unlikely to approach the levels needed by customers to consider the wireless service as a substitute for wireline service. He noted that wireline carriers would not be providing such quality service with broad geographic coverage without an extended history of receiving USF support. Second, customers have been reluctant

to substitute wireless for wireline service in part because telephone numbers were not portable. A customer that historically subscribed to service from Frontier could not cancel that service and subscribe to local service offered by Easterbrooke without giving up his or her longheld telephone number. However, wireline to wireless number portability, recently ordered by the FCC, eliminates that barrier, making substitution of wireless for wireline service more likely. (Easterbrooke Exhibit 2B, p. 16).

Mr. Wood also noted that Mr. Swatts had no factual support at all for his suggestion that Easterbrooke would use any federal support funds in an inappropriate manner. Mr. Wood noted that the use of federal support funds is specifically for the provision, maintenance and upgrading of facilities and service for which the support is intended. Easterbrooke is only permitted to use those funds for specific purposes, which will provide benefits to the people who live and work in these rural areas. Additionally, other safeguards are applicable. The USAC can conduct audits to insure that the use of support funds by any ETC complies with the requirements of the Telecommunications Act of 1996. Further, the Public Service Commission has the ability and responsibility to insure that funds received by Easterbrooke or any other ETC are used appropriately. Easterbrooke will work with the Commission in the annual recertification process to insure that the Commission has the information necessary to fully understand how Easterbrooke used all of the USF funds it received. Mr. Wood believes that there is no reason to assume that the Commission will not fulfill its annual duties in this regard. Finally, wireless carriers like Easterbrooke are licensed by the FCC, which has the authority to investigate their operations and institute punitive measures if necessary. The presence of all of these safeguards will insure that the funds will be used as intended and that Easterbrooke will be held to the kind of accountability that Frontier suggests, without the need for the additional requirements proposed by Mr. Swatts. (Easterbrooke Exhibit 2B, pp. 17-18).

With respect to Frontier's claims that customers who do not currently have coverage at their business may nonetheless use a wireless phone when away from their billing address, or that few wireless customers use their service at home, Mr. Wood noted that customers receive benefits from their ability to use a mobile phone in terms of the ability to do their job, convenience, health and safety or some combination of these opportunities, all of which serve the public interest. Further, customers would receive additional benefits if their wireless service was not geographically limited, but instead was extended scope to include their home or place of employment. According to Mr. Wood, it is the desire to provide this service at the customer's home or business location, i.e., to provide a viable substitute for wireline service, as well as the customer's desire to purchase such a service, that makes the public interest aspect of Easterbrooke's petition clear. Frontier built its networks out over time to reach those areas while receiving universal service support. With the same opportunity, Easterbrooke could build out its network to extend its coverage to provide exactly the coverage that Mr. Swatts argued is lacking. All of these are compelling reasons why Easterbrooke should be designated as an ETC. (Easterbrooke Exhibit 2B, pp. 18-19).

Mr. Wood also disputed that the existing USF mechanism creates a windfall for wireless carriers. First, even if Easterbrooke's per line costs proved to be lower than those of Frontier, no windfall can occur. The rules specifically limit Easterbrooke's use of the funds to the investment in and operation of network facilities in the high cost area. The worst outcome that can be realized is that, if Easterbrooke's per line costs are indeed lower, it will be encouraged to build out its network on an accelerated basis. Once this build-out is complete, support can be based on the more efficient network, thereby minimizing the size of the fund over the long run. Easterbrooke has committed to use all support funds to build out and operate network infrastructure in these rural areas, which is fully consistent with the stated purposes of the USF mechanism and the interests of West Virginia customers. (Easterbrooke Exhibit 2B, pp. 19-20).

Mr. Wood argued that concerns regarding the size of the Federal Universal Service Fund are not relevant to this proceeding because they are not related to any of the specific characteristics of Easterbrooke's petition or to any rural ILEC service area identified in Easterbrooke's petition. Further, to the extent they have merit, both concerns are currently being addressed by the FCC and the Federal-State Joint Board on Universal Service. Mr. Wood believes that it is the Commission's task in this proceeding to apply the ETC rules as they currently exist. He disagrees that ETC designation hearings are the appropriate forum to address broader policy issues related to the USF. (Easterbrooke Exhibit 2B, p. 22).

Mr. Wood also argues that concerns about the size of the funds do not constitute a good reason to deny Easterbrooke ETC status. He argued that growth in the Universal Service Fund was explicitly anticipated and considered by the FCC when it developed the rural Universal Service mechanism. He noted that the FCC rejected several elements that had been proposed for inclusion in the universal support mechanism, even though they would have limited the size of the fund. As an example, he noted that the FCC rejected a proposal by the Rural Task Force to freeze high cost loop support upon competitive entry in high cost areas. (Easterbrooke Exhibit 2B, pp. 23-24).

Mr. Wood also argued that the largest factors relating to the size of the fund are compromise elements that were included in the funding mechanism by the FCC for the benefit of rural telephone companies. He noted that the size of the high cost loop fund in large part is a direct function of the FCC's decision to give the rural ILECs an extended transition period in which to improve their efficiency, reduce their costs and better prepare themselves to operate in a competitive market. He arqued that those elements of the mechanism represent a far greater impact on the size of the fund than any concerns related to additional ETC designations. (Easterbrooke Exhibit 2B, pp. 24-25). Mr. Wood noted that rural ILECs asked for and received from the FCC various protections from the impact of competition as part of the interim support mechanism; those protections have caused the size of the high cost fund to increase; and now the rural ILECs are using the fact that the fund is growing as support for an argument that actual competitive entry should be limited. (Easterbrooke Exhibit No. 2B, p. 26).

Mr. Wood also argued that, while the high cost fund should be prudently managed, it should not be managed on a strictly short-term prospective. He argued that the fund should be managed on a long-term basis in a way that focuses on benefits to consumers, rather than carriers. The concern that additional ETC designations mean an increase in demands on the fund is an example of a short-term prospective. He argued that an attempt to minimize the size of the fund on a short-term or quarter-by-quarter basis will almost certainly result in a larger than necessary fund over the long run. He believes that the fact that support to competitive ETCs has grown over the past 18 months simply means that the process of ETC qualification is working as intended. As competitors enter rural markets, support to carriers other than the ILECs inevitably grows. He believes that this should not be viewed as an adverse or an unintended consequence. In the long run, growth and support to competitive ETCs versus growth and support to incumbent ETCs is useful only as a barometer of how well the process is working. (Easterbrooke Exhibit No. 2B, p. 28).

Mr. Wood also took issue with Mr. Swatts' argument that, since Easterbrooke is already providing wireless service in the study areas in which it is requesting ETC designation, there is no public interest in granting ETC designation to Easterbrooke. According to Mr. Wood, there is no dispute that Easterbrooke is currently providing some services in some of the areas served by rural ILECs in West Virginia. But Easterbrooke is making a commitment in this case to provide the supported services throughout those service areas in direct competition with the rural ILECs, which it could not do without USF support. Easterbrooke has made substantial investments in its West Virginia network and provides coverage throughout several areas. Now, however, Easterbrooke is seeking to offer the supported universal services throughout these areas at a level of quality that can compete directly with the current wireline local service offerings. This requires access to USF support, just as access to such support was necessary for the ILECs to make the same commitment. (Easterbrooke Exhibit No. 2B, pp. 30-31). Mr. Wood noted that network build-out will improve service quality and coverage to the point that rural customers may actually find wireless service to be an alternative for wireline service. Such an outcome is fully consistent with the stated objectives of the Act. (Easterbrooke Exhibit No. 2B, p. 31).

Mr. Wood also took issue with the assertions by Mr. Swatts that Easterbrooke should not be designated as an ETC because it cannot offer services outside of its FCC-licensed service area. He noted that the only stated basis for Mr. Swatts' assertion is that Easterbrooke does not directly route traffic to Frontier. Mr. Wood pointed out that such a direct connection is not required in order for an Easterbrooke customer to complete a call to a Frontier customer or vice versa. Easterbrooke routes traffic to Frontier via tandems operated by Verizon. Neither the Act nor the FCC requires every carrier to interconnect directly with every other carrier, recognizing that such an arrangement would be technically infeasible and inefficient. Interconnection through a third-party carrier at the level of an access tandem is feasible, efficient and representative of how the vast majority of carriers, both wireless and wireline, interconnect with each other. (Easterbrooke Exhibit No. 2B, p. 32). According to Mr. Wood, Mr. Swatts' problem is not that Easterbrooke

cannot offer the supported services, or that Easterbrooke customers cannot place calls to Frontier customers beyond the Easterbrooke licensed area, or that the traffic is routed by a Verizon tandem. Rather, Mr. Swatts' real issue is reciprocal compensation, which Mr. Wood believes is disingenuous and based on a misunderstanding of the requirements of the Act. Section 251 does not require Easterbrooke to have an interconnection agreement with Frontier unless Frontier requests such an agreement. Frontier has not done so and Easterbrooke is in full compliance with its Section 251 obligations. Mr. Wood noted that Frontier has been making the same assertion in other jurisdictions as well. (Easterbrooke Exhibit No. 2B, pp. 32-33).

Mr. Wood noted that Mr. Swatts was simply wrong when he asserted that the law requires that carriers pay each other reciprocal compensation. Rather, carriers can engage in a mutual exchange of traffic on a payment in kind basis, which is referred to as "bill and keep." Such an arrangement can be formalized in an interconnection agreement or it may be informal. Eaterbrooke is terminating calls originated by Frontier customers and Frontier is terminating calls originated by Easterbrooke customers. If either carrier believes that a payment in kind or bill and keep arrangement is not satisfactory, it can request an interconnection agreement. Neither of these carriers has done so. Mr. Wood noted that the remedy to Mr. Swatts' problem, assuming that Frontier actually seeks a remedy, is to negotiate an interconnection agreement with Easterbrooke. (Easterbrooke Exhibit No. 2B, pp. 33-34).

Mr. Wood also took issue with statements made by Mr. Swatts regarding the cost to serve customers in different geographic areas. He noted that Mr. Swatts stated extensively that rural areas are so expensive to serve that, without high cost support, no carrier could afford to provide that service. Mr. Wood agreed that all things being equal, rural areas are more costly to serve than more urban areas. He disputed Mr. Swatts' assertion that, in the areas served by Frontier, no carrier would find it viable to provide service without USF support and, therefore, USF support should not be available to any other carriers. Mr. Wood asserted that, what Mr. Swatts actually meant was that, absent USF support, it was not viable for another wireline carrier with Frontier's current cost characteristics to serve the area. The initial assumption may be correct, but his conclusion is not logical. Mr. Wood noted that the FCC has consistently concluded that the entry of an additional ETC into a rural area can be expected to provide incentives to the incumbent to implement new operating efficiencies, lower prices and provide better service to its customers. In response to such incentives, Frontier may be able to increase efficiency over time so that a lower level of USF support is needed. Equally important, the designation of an additional ETC, which may have a lower cost structure than Frontier, will enable that additional ETC to build out its network in the area. Over the long run, it may be desirable to fund only a single carrier to serve the area, but the carrier to be funded should be the one that provides service at the lowest cost. (Easterbrooke Exhibit 2B, pp. 34-35).

Mr. Wood also disputed that any additional standards should be imposed upon Easterbrooke in order to obtain ETC designation. Easterbrooke has committed to meeting all of the legal requirements. According to Mr. Wood, the further imposition of additional standards is

unnecessary because the competitive market will effectively constrain competitive ETC prices and services. If the ETC's offerings do not meet customer expectations, end users won't purchase the service and the ETC will receive no federal support. Mr. Wood argued that all of the additional standards and requirements recommended by Mr. Swatts will create no public benefit and would act as effective barriers to entry for a wireless carrier. (Easterbrooke Exhibit 2B, pp. 35-36).

Mr. Wood also disputed Mr. Swatts' testimony regarding cream skimming. He noted that the FCC has been clear that it does not consider the fact that a competitive ETC serves only a portion of an ILEC service area to be a demonstration of cream skimming. He noted that USF disaggregation significantly limits the possibility for cream skimming. Further, the FCC has concluded that a cream skimming concern must be based on more than the fact that a competitive ETC will serve less than the ILEC's service area. A cream skimming determination must be based on a showing that the ETC is deliberately seeking to enter certain areas in order to cream skim. Mr. Wood noted that there is no evidence that Easterbrooke is engaging in such a strategy. (Easterbrooke Exhibit No. 2B, pp. 38-39).

According to Mr. Wood, as a practical matter, it is almost impossible to successfully accomplish the objective of cream skimming. In order to be successful, the new entrant needs to incur costs in the same way as the ILEC. Only if the high-cost and low-cost areas of the ILEC and the new entrant match is cream skimming even theoretically possible. Since all parties agree that wireless carriers have a cost structure that is different from that of wireline carriers, cream skimming is not a given. Further, network costs do not vary in a predictable way. It is almost impossible to conclude that network costs vary based on any specific set of criteria. Costs vary on a very discreet geographic scale, making it difficult, if not impossible, to identify individual customers that are low cost and thus represent a cream skimming opportunity. Mr. Wood noted that Easterbrooke has an obligation to serve the entirety of its CMRS licensed area. The FCC has recently concluded that a commitment by a wireless ETC to provide the supported services throughout its licensed service area, even when the contour of its licensed area differs from the study area of the existing telephone companies, indicates that the cellular ETC is not seeking to cream skim and such cream skimming concerns are minimized. (Easterbrooke Exhibit No. 2B, pp. 39-40).

During his testimony on the stand, Mr. Wood addressed Mr. Swatts' recommendation that Easterbrooke be required to use its USF support to reduce rates in the identified high-cost areas, rather than invest in plant. Mr. Wood argued that, if there are rate reductions to be made in the marketplace, Easterbrooke will make them. He noted that Lifeline or Link-Up programs are in place exclusively for the purpose of making the service affordable to low-income subscribers. However, he noted that Section 254 of the Act and corresponding FCC rules provide that the stated purpose and intended use of the funds is for investment and operation and upgrading network facilities. Further, the prudent thing in many cases is to invest those dollars, rather than spend them today. (Tr., pp. 49-50). He argued that there is long-term benefit in providing this kind of infrastructure and these technology options. (Tr., pp. 51-52). Most of the benefits that can be provided are associated with

putting dollars in plant today. Simply offering a rate reduction won't accomplish any long-term benefits, such as improved infrastructure, health and safety or the broader coverage of wireless service. (Tr., pp. 51-52).

Mr. Wood argued that the question to be addressed in this case is whether or not designating Easterbrooke as an ETC is in the public interest based on Easterbrooke's merits as a carrier and looking at the study areas in which Easterbrooke is seeking ETC status. (Tr., pp. 54-55). He argued that the test proposed by both Mr. Swatts and the Consumer Advocate Division, which indicates that the cost of serving some of these areas is so high that they could not support another ETC designation, are based on the costliness of a wireline carrier operating under Frontier's costs as measured by the FCC. He argued that a high-cost area to a wireline carrier is not necessarily the same as a high-cost area to a wireless carrier. (Tr., pp. 54-57).

Mr. Wood also discussed the bill and keep arrangement in more detail. Bill and keep simply means that one carrier terminates calls originated on another carrier's network in exchange for the second carrier terminating the first carrier's customers calls. The actual dollars related to those calls aren't transferred back and forth. Rather, it is an exchange of a service or value. Bill and keep is the de facto arrangement between two carriers who don't have an interconnection agreement and represents the arrangement currently in effect between Easterbrooke and Frontier. (Tr., pp. 82-83). Mr. Wood noted that there are between 1,700 and 1,800 local exchange companies nationwide and regulators don't want everyone trying to make a physical connection to each other. Bill and keep accomplishes indirectly what otherwise would be done directly. Further, Mr. Wood pointed out that Section 251(a) states that interconnection can be direct or indirect. If Frontier believes that Easterbrooke should have an interconnection agreement with it and asks Easterbrooke to enter into such an agreement, Easterbrooke would have a duty to negotiate in good faith. If the negotiation failed, Frontier could bring the matter to the Public Service Commission for arbitration. (Tr., pp. 83-84).

Frontier presented rebuttal testimony from its witness Swatts. Mr. Swatts denied that Frontier was seeking to put competition on trial or to claim that competition is not in the public interest. He noted that competitors are free to enter Frontier's study area at their own discretion and that Frontier has waived its rural exemption in West Virginia, absent which competitors could not obtain wholesale discounts for reselling Frontier's services or obtain unbundled network elements from Frontier. Therefore, despite the fact that Frontier is an RTC, other carriers are free to compete with it by building their own networks, by reselling Frontier's services or by purchasing unbundled network elements from Frontier. (Frontier Exhibit 3, pp. 2-3).

Mr. Swatts again argued that Easterbrooke does not compete with Frontier. Therefore, regardless of whatever benefits may flow from competition, those benefits are not present here. Second, the promotion of competition is not a relevant consideration in examining the public interest. If the promotion of competition by itself were enough to satisfy the public interest test, there would be no need for the test.

While there is a general policy goal of promoting competition, universal service is a separate policy goal which must be examined on its own merits. Additionally, the promotion of competition is not a goal of universal service and the universal service mechanism cannot be used as a means of promoting competition. Finally, Easterbrooke is not a new entrant and providing it with USF monies will not create a new competitor, increase competition or give consumers a choice they don't already have. Easterbrooke has provided service since 1990 and claims to already be providing the services supported by the Universal Service Fund. (Frontier Exhibit 3, pp. 3-4). Mr. Swatts argued that neither Mr. McGaw nor Mr. Wood identified any benefit in their testimony to support their claims that designating Easterbrooke as an ETC is in the public interest, other than competitive entry. (Frontier Exhibit 3, p. 5). Mr. Swatts also argued that Easterbrooke really only competes with other wireless carriers, and such competition will only intensify with the recent advent of wireless local number portability. (Frontier Exhibit 3, p. 6).

Mr. Swatts agreed with the various steps laid out by Mr. McGaw in his testimony that Easterbrooke is willing to take in order to extend service to customers who live in areas where Easterbrooke's cellular signal does not currently reach. However, Mr. Swatts believes that those steps by themselves are inadequate. He believes that Easterbrooke should also utilize other technologies that are available to it if it cannot economically serve a customer using wireless technology. USF monies are to be used to provide the nine supported services, regardless of the technology used. If an ETC is not willing to use all available technologies, it should not be so designated. (Frontier Exhibit 3, p. 6). Swatts acknowledged that building out Easterbrooke's network would be a permissible use of USF monies. But he argued that rate reduction is also a permissible use and one that should have the greatest impact on the availability of Easterbrooke's service, particularly in light of Easterbrooke's testimony that relatively modest income levels and significant poverty are challenges to Easterbrooke's efforts to satisfy its coverage and service objectives. (Frontier Exhibit 3, pp. 7-8).

Mr. Swatts agreed with the Consumer Advocate Division's assessment of the percentage of total revenue that each of its study areas receives The St. Mary's Study area receives from the Universal Service Fund. approximately 27% of its total revenue from USF support. It would be a significant harm to Frontier if it were to loose 27% of its total revenues and would have to raise rates. (Tr., pp. 138-139). Mr. Swatts also testified that, while he doesn't know where the break point is, he knows that there is a break point where it makes no sense to fund two or more networks under the USF mechanism. He agreed that there were no public interest tests for non-rural carriers, such as Verizon, although these non-rural carriers do receive support from the Universal Service Fund. Verizon receives approximately \$3.00 per line per month from the He agreed that \$8.00 per line might be a reasonable break point. USF. (Tr., pp. 143-145).

The last witness to provide rebuttal testimony in this proceeding was Billy Jack Gregg, the Director of the Consumer Advocate Division of the Public Service Commission. Mr. Gregg has been the Director of the Commission's Consumer Advocate Division since 1981, and has been extensively involved in regulatory issues since that time, not only in

his position as Director of the Consumer Advocate Division, but in his participation in the National Association of State Utility Consumer Advocates, the Rural Task Force of the Federal-State Joint Board on Universal Service, the Board of Directors of the National Regulatory Research Institute and, since March of 2002, as a member of the Federal-State Joint Board on Universal Service. Mr. Gregg has also been a member of the Board of Directors of the Universal Service Company. (CAD Exhibit 2, Appendix A). The CAD believes that it is in the public interest to grant ETC status to Easterbrooke in a portion of the area served by Frontier, but not in all of the Frontier study areas for which the petition was made. Specifically, the CAD is recommending that Easterbrooke be granted ETC status in the wire centers contained in Frontier's St. Mary's study area, i.e., Davis, Thomas, Canaan Valley, Parsons, Clay, Harmon, Ivydale, Widen and Birch River. The CAD is recommending that Easterbrooke be denied ETC status in the wire centers contained in Frontier's Mountain State study area, i.e., Webster Springs, Mill Creek, Cowan, Arbovale, Marlinton, Hillsboro, Snowshoe, Walkersville and Hacker Valley. The CAD's recommendation is based primarily on the cost to serve those areas and the level of federal universal service support received by each study area. (CAD Exhibit 2, pp. 1-2). Gregg also asserted that the maps submitted by Easterbrooke in this proceeding contain numerous errors and cannot be relied upon. He also recommended that Easterbrooke be directed to serve all customers in the wire centers for which it is granted ETC designation, regardless of whether some of those wire centers extend beyond Easterbrooke's licensed wireless service territory and that the Commission should impose conditions upon any ETC designation of Easterbrooke in order to ensure that the ETC requirements continue to be met on an ongoing basis and that the USF funds are used for their intended purpose. (CAD Exhibit 2, p. 2) -

Mr. Gregg reiterated that Easterbrooke is licensed to provide wireless services in WV RSA 5, consisting of Braxton, Clay, Nicholas, Webster, Pocahontas, Randolph, Upshur and Tucker Counties. He also reiterated that Easterbrooke had previously received ETC designation in the wire center served by Verizon within its licensed service areas. He listed the counties and wire centers for which Easterbrooke is seeking ETC designation in Frontier's territory. (CAD Exhibit 2, Exhibit BJG-1). He noted that, while Frontier has three study areas in West Virginia, the Frontier wire centers affected by Easterbrooke's application are located in the St. Mary's and Mountain State study areas. Mr. Gregg also listed the wire centers affected by Easterbrooke's application by Frontier study area. (CAD Exhibit 2, pp. 3-4).

Mr. Gregg also defined study area, which is generally an incumbent telephone company's preexisting service territory within a state. The boundaries of the study areas were established as of November 15, 1984, by FCC Order. Frontier's three study areas correspond to the service territories of the previous owners of those service territories. The Bluefield study area is made up of wire centers formerly owned by General Telephone. The St. Mary's study area is made up of wire centers formerly owned by Contel. The Mountain State study area is made up of wire centers formerly owned by AllTel. While a company such as Frontier may operate as a single company within a state, federal universal service support is determined on a study area basis. (CAD Exhibit 2, p. 4). The

Exhibit BJG-2 attached to CAD Exhibit 2 shows the disaggregated per line high cost support for each Frontier wire center in both study areas affected by Easterbrooke's application. He also provided the annual support which results from this per line support. The wire centers in the Mountain State study area produce support of approximately \$7.9 million per year, while the St. Mary's study area wire centers produce support of approximately \$2.3 million per year. (CAD Exhibit 2, Exhibit BJG 2).

Mr. Gregg indicated that he partially agreed with the arguments made by the witnesses for both of the other parties. He noted that designation of an additional ETC would provide additional choices, competition and improvement of the ETC's network. He noted, however, that this will always be the case when an additional subsidized carrier is designated. He agreed with Frontier witness Swatts that, if the benefits of competition alone were enough to satisfy the public interest test, Congress would not have established a separate public interest test for ETC applicants in rural study areas. It simply would have mandated ETC designation upon a showing that the applicant can provide the supported services and advertise their availability, just as it did for the non-rural study areas. (CAD Exhibit 2, p. 6).

However, Mr. Gregg disagreed with Mr. Swatts' testimony that no additional ETC should be allowed in Frontier's study areas because those study areas receive USF support. He noted that numerous non-rural carriers receive USF support and Congress made a policy decision that additional ETCs should be allowed in those areas, assuming they can provide and advertise the supported services. Mr. Gregg noted that the highest amount of USF high cost support received by a non-rural carrier is approximately \$8.00 per line per month, received by Puerto Rico Telephone Company. (CAD Exhibit 2, p. 6). Mr. Gregg agreed with Mr. Swatts, however, that there are areas that are so costly to serve that it would make no sense to support an additional subsidized carrier. It is Mr. Gregg's belief that this is one of the reasons why Congress made ETC designation in rural study areas discretionary with state commissions and only if those designations were found to be in the public interest. While he did not agree that all rural study areas that receive high cost support should be exempt from having additional ETCs, Mr. Gregg did believe that the higher the level of support received by a study area, the greater the scrutiny that an ETC application for that area should receive. He believes that the public interest test essentially is a cost benefit analysis, i.e., whether the cost and potential harm of supporting an additional subsidized carrier in a rural study area outweigh the benefits resulting from having an additional ETC. (CAD Exhibit 2, p. 7).

Mr. Gregg acknowledged that, under the current rules, the federal universal service mechanism supports all lines of all ETCs and that allowing an additional ETC in Frontier's study areas will not result in any reduction in the support it receives. However, he noted that, because of concerns about the growing size of the fund, there are several proposals to limit support to only primary lines or to only one ETC per customer. If any of those proposals are adopted by the Joint Board and/or the FCC, USF funding will be contestable among all ETCs and could lead, ultimately, to a reduction of support for all ETCs, including incumbents. (CAD Exhibit 2, p. 7).

For the fourth quarter of 2003, the St. Mary's study area received an average of \$16.81 per line in monthly high cost support. The Mountain State study area receives over twice as much, approximately \$37.76 per line in monthly high cost support. Mr. Gregg's Exhibit BJG-3 shows the total revenue of each ILEC in West Virginia for 2002, along with the amount of federal universal service support received by each carrier. USF high cost support constitutes almost 44% of the total revenue generated in the Mountain State study area and 27% of the total revenue generated in the St. Mary's study area. (CAD Exhibit 2, p. 8 and Exhibit BJG-3).

According to Mr. Gregg, the national average residential rate for flat rate service in urban areas is \$23.28 per month. The average residential rate in West Virginia is higher. The FCC reference book lists Verizon's average rate in West Virginia as \$28.61 a month. Frontier's average residential rate would probably be slightly higher, approximately \$30.00 per month. The amount of per line federal high cost support in the St. Mary's study area is less than the national average residential rate and the average Frontier residential rate. However, the amount of per line support received in the Mountain State study area is higher than the average national rate and the average rate for Frontier. According to Mr. Gregg, this indicates that it is extremely expensive to provide service in the wire centers located in Frontier's Mountain State study area. (CAD Exhibit 2, pp. 8-9).

It is Mr. Gregg's belief that the levels of high cost support received in the St. Mary's study area are low enough that more than one ETC can be supported, and that the cost and potential harm for such additional support are not excessive. Therefore, he believes that it is in the public interest to grant Easterbrooke's ETC application in the St. Mary's study area, subject to certain conditions. However, because of the high levels of support received in the Mountain State study area, he believes that it is not in the public interest to designate Easterbrooke as an ETC for the wire centers in that study area. He believes that the high level of support received in the Mountain State study area makes this an area where the number of ETCs should be limited. (CAD Exhibit 2, pp. 9-10).

Mr. Greqq asserted that, while a by-product of USF funding may be that certain wireless networks are strengthened and expanded, it is not the purpose of USF funding to build out wireless networks in rural areas. The purpose of USF funding is to help provide the supported services and the facilities necessary to provide those services, regardless of the technology used to provide them. He noted that wireless services and mobility are not supported services. (CAD Exhibit 2, p. 10). He noted that deciding whether to allow multiple supported carriers in a rural area is a balancing act, weighing the cost and potential harm in supporting ETCs against the benefits of receiving additional funding. He argued that it must be remembered that funding for the Universal Service Fund comes directly from customers and all parties have a responsibility to ensure that these limited resources are used in a responsible way. He believes that there are some areas where it is so expensive to provide service that it makes no sense to support more than one subsidized carrier and he believes that the Mountain State study area is one of (CAD Exhibit 2, p. 10). those areas.

In Mr. Gregg's testimony, including the two corrected pages that are contained in Exhibit 2A, being pages 11 and 12 of his prepared testimony, and a corrected Exhibit BJG-1, Mr. Gregg discussed the accuracy of the maps provided by Easterbrooke, attached to Mr. McGaw's testimony. The boundaries of the wire centers contained in those maps were drawn by a nationally available software program, but they did not match the official exchange boundary maps on file at the Commission. He believes that Exhibit BJG-1 provides a more accurate representation of those exchange boundaries. However, he believes that the inaccuracy of the boundaries shown on the Easterbrooke exhibits have little impact on Easterbrooke's ETC application, except for wire center areas which extend beyond the boundaries of Easterbrooke's eight-county service area. (CAD Exhibit 2A, p. 11). He noted that, while Easterbrooke is licensed to provide wireless service within the eight-county area previously discussed, some of the Frontier wire centers, within which Easterbrooke seeks ETC status, extend beyond its licensed territory. There are two areas where the Frontier wire center boundaries extend beyond the county boundaries, i.e., Frontier's Walkersville wire center in Lewis County serves a portion of northern Braxton County included in Easterbrooke's petition and the Thomas and Davis wire centers serve the western portion of Grant County, which is not part of WV RSA 5 and, therefore, is not included in Easterbrooke's application. There are also several wire centers in the Verizon service area where Easterbrooke has already been granted ETC status that differ from the boundaries of WV RSA 5, although those areas are not at issue in this case. (CAD Exhibit 2A, pp. and Exhibit BJG-1).

According to Mr. Gregg, the Commission should specify that Easterbrooke is granted ETC status within the boundaries of designated wire centers, regardless of whether the boundaries of those wire centers extend beyond the county boundaries within which Easterbrooke is licensed to provide wireless service. (CAD Exhibit 2A, p. 12; CAD Exhibit 2, p. 13). Mr. Gregg noted that Easterbrooke's wireless signal extends beyond the boundaries of the eight counties within which it is licensed to provide wireless service and Easterbrooke is not limited to providing its own wireless services, but may provide service through resale of wireline or other wireless services. He believes that requiring Easterbrooke to provide service throughout existing wire centers uses readily determined existing boundaries and will avoid the problem in defining a service area smaller than an individual wire center. (CAD Exhibit 2, p. 13).

Mr. Gregg testified that, in this case, the Commission should follow the procedures set forth in Section 214(e)(5) of the Act and Section 54.207 of the FCC's regulations which provide for redefinition of a service area and redefine Easterbrooke's service area to include the Frontier wire centers of Clay, Ivydale, Widen, Birch River, Harmon, Parsons, Thomas, Davis and Canaan Valley. Following the issuance of an Order approving ETC status in this case, the Commission should direct Staff to file a petition with the FCC seeking its concurrence in this service area redefinition. (CAD Exhibit 2, pp. 13-14).

With respect to the conditions recommended by Frontier witness Swatts, to be placed on Easterbrooke if it is granted ETC status, Mr. Gregg recommended that Easterbrooke be held to the same conditions which have previously been placed on ETCs, in Easterbrooke's own ETC designa-

tion case involving the Verizon wire centers, Case No. 02-1118-T-PC, and in the <u>Highland Cellular</u> case, Case No. 02-1453-T-PC, which is still pending. These conditions include obligations to provide service when customers are unable to receive an adequate signal; the filing of periodic reports to the Commission on unserved areas and network deployment; the filing of informational tariffs with the Commission, including the terms of Lifeline and Link-Up programs for low-income customers; and the filing of annual reports with the Commission demonstrating how the USF funds were used. Further, Easterbrooke should be required to comply with the advertising requirements for ETCs established by the Commission in previous cases. Finally, any grant of ETC status should be conditioned on compliance with any standards for ETCs which are established as a result of the ongoing ETC task force in P.S.C. Case No. 03-1119-T-GI. (CAD Exhibit 2, p. 14).

On the stand, Mr. Gregg testified that, while he did not know how many customers Easterbrooke served, it reported 305 lines in the Mountain State study area and 1,563 lines in the St. Mary's study area. (Tr., pp. Mr. Gregg noted that competitive ETCs accounted for \$94.5 90-91). million of the Universal Service Fund support for the first quarter of 2004, representing 10.5% of the high cost fund support and 6% of the overall Universal Service Fund, which includes schools, libraries, health care and low income support. However, the support paid to competitive ETCs is the fastest-growing portion of the high cost fund. It is higher than the high cost model mechanism and is approaching the level paid out under local switching support and long term support. Annualized, the \$94.5 million paid to competitive ETCs will amount to almost \$400 million (Tr., pp. 91-92, 128). He acknowledged that all of the per year. arguments raised about how much is paid to rural carriers is entirely correct; rural carriers currently get the largest amount, well over \$1 billion out of the \$3.2 billion in high cost funds. (Tr., p. 92).

In making his recommendation, Mr. Gregg looked at the total amount of support in the various Frontier study areas compared to what customers are currently paying. The amount of support Frontier receives in the Mountain State study area equals or exceeds the amount of revenue that it gets from its own customers on a per line basis. Based on that, it appears to Mr. Gregg that Frontier's Mountain State study area is an area where the costs are so high and the amount of support necessary to maintain universal service is already so high that it makes no economic sense to have an additional subsidized carrier. This doesn't mean that there can't be competitive entry in the Mountain State study area. question is how many competitive ETCs will be subsidized with public According to Mr. Gregg, as long as the nine supported services money. are provided in an area at comparable prices, the promise of universal service has been fulfilled and one should ask very hard questions before going forward and spending additional public funds to subsidize ETCs in very high cost areas. (Tr., pp. 93-94).

Mr. Gregg pointed out that one ETC has already been approved for all three Frontier study areas, FiberNet. To his knowledge, however, FiberNet is not providing service to any of the wire centers in the Mountain State study area. Mr. Gregg doesn't think there should be any additional ETCs designated in the Mountain State study area at this time, although this could change down the road when perhaps there is a

different cost structure and more efficient providers. (Tr., pp. 94-95).

With respect to the suggestion that Easterbrooke be required to serve all of any wire center even if it is partially outside of its licensed wireless service area, Mr. Gregg believes that Easterbrooke has two options if it objects to that condition. It can either choose not to seek ETC designation in those wire centers, which is what AllTel did in West Virginia and elsewhere, or it can seek authority to serve those Mr. Gregg noted that ETC status is technology neutral. doesn't require that the nine supported services be provided using any particular technology. Easterbrooke can use a combination of technologies in those wire centers, probably a combination of wireless and resale (Tr., pp. 95-96). Mr. Gregg believes that his of landline service. proposal is reasonable to avoid confusion among customers as to where an ETC will undertake its ETC obligations and where it will provide service. According to Mr. Gregg, Easterbrooke needs to make a choice, either it must serve all of the wire centers or seek ETC status in those wire centers which extend beyond its boundaries. (Tr., pp. 96-97). Mr. Gregg believes that Easterbrooke should not obtain ETC status if it is not willing to serve all of the customers in a wire center. (Tr., pp. 97-

Gregg acknowledged that the Universal Service Fund still supports all lines of all ETCs. (Tr., p. 98). Mr. Gregg acknowledged that the universal service mechanism collects funds from a broad range of customers in order to help support certain categories of services that have been singled out for subsidy, that is, areas that are costly to serve, such as rural, insular or high cost areas, where, but for federal subsidies, there probably wouldn't be telephone service. (Tr., pp. 99-Another area is support for low-income households that couldn't afford telephone service without a subsidy. A third category is rural health care, meaning subsidized services for health care providers in rural areas, including access to advanced services. The fourth category of supported service consists of subsidies to schools and libraries to give them access to advanced services at cheaper rates than they would otherwise have to pay. The total paid out under all of the Federal Universal Service Funds in 2003 was \$6.2 billion. However, the funding base for the Universal Service Fund has been declining or stagnant in recent years at approximately \$77 to \$80 million annually. The problem is that assessments for the Universal Service Fund are made only against interstate and international revenues. The total revenue base of over \$230 million per year hasn't been tapped, although there are discussions in Congress that would allow USF assessments against intrastate revenues. (Tr., pp. 99-100). Obtaining ETC designation allows a company to draw funds from the high cost fund and the low-income fund. ETC designation also carries with it serious obligations for the designee. 100-101).

In Mr. Gregg's opinion, the USF mechanism was not intended to foster or create competition in rural areas or any other areas. The twin pillars of the Telecommunications Act of 1996 were competition and universal service. If all that Congress cared about was competition, you could potentially leave rural areas behind, causing rates to be unaffordable. (Tr., p. 101). He acknowledged that the Universal Service Fund is funding multiple networks and multiple ETCs in certain areas today. He

doesn't believe that that is the purpose of the fund and it is currently being looked at by the Joint Board and the FCC. He agreed that there is nothing in the Act to suggest that Universal Service Fund should be used to ensure that customers have both wireline and wireless service. does not think that the purpose of Section 254 is to promote competition, although the end result may be that multiple networks are supported in certain areas. He believes that the purpose of Section 254 is to ensure that all customers in all areas of the nation, including those in insular, rural and high cost areas, have access to a certain basic level of telecommunication services at rates comparable to those that are paid in urban areas. However, simply because an urban area might have five wireless providers and three landline providers doesn't mean that every rural customer is entitled to that same level of service or the same Nothing in Section 254 of the Act suggests that number of networks. customers are entitled to or should expect support for one wireless and one landline network. (Tr., pp. 102-103). He believes that, if the nine supported services are available at comparable rates as in urban areas, the Universal Service mechanism has fulfilled its primary mission. (Tr., p. 103). He pointed out that one of the reasons for the different standard for designating ETCs in rural study areas was the concern about the impact of unfettered competition on the ability of the subsidized carriers to survive in the competitive environment. Therefore, the designation of additional ETCs is discretionary with the states for rural areas and can be made only after a positive finding that doing so is in the public interest. (Tr., p. 104). Mr. Gregg noted that limiting the number of ETCs in a rural area does not preclude competitors from entering that area and he noted that Easterbrooke has been serving the area at issue since 1990 without any subsidy. The only issue is whether Easterbrooke qualifies for the USF subsidies, in addition to the subsidies already being paid to Frontier for its existing network. (Tr., pp. 104-105).

Mr. Gregg reiterated that Frontier's Mountain State study area is so costly to serve that it simply doesn't make economic sense to designate another ETC in that area. The support per line in the St. Mary's study area is approximately \$16.00 per line per month, while the level of support per line per month in the Mountain State study area is approximately \$30.00, almost double the amount of the St. Mary's study area. Mr. Gregg believes that the relevant area of inquiry is the study area and not the wire center, because support is paid on a study area basis. The level of support for the St. Mary's area is low enough to support an additional ETC, whereas the Mountain State study area is simply too expensive. (Tr., pp. 112-113).

Mr. Gregg again reiterated his disagreement with Frontier's view that there should be no additional ETCs designated in any area that receives any high cost support, noting that non-rural study areas receive high cost support and the designation of additional ETCs is mandatory in those areas. He acknowledged that different people can disagree where the line should be drawn between granting additional ETCs and not granting additional ETCs. He reiterated his belief that a better policy is to require increased scrutiny as the level of support for the incumbent increases. Roughly half of the study areas receive more than \$20.00 per line per month in support. They serve only 1.7% of the population and they get 44% of the high cost fund. (Tr., pp. 113-115).

Mr. Gregg acknowledged that each case has to be looked at individually. (Tr., pp. 115-116).

## DISCUSSION

Under the Telecommunications Act of 1996, designation as an ETC is essential in order for common carriers of telecommunications services to be eligible to receive federal universal service support pursuant to 47 U.S.C. \$254. In order to be designated as an ETC, an applicant must: (1) be a common carrier; (2) offer the services supported by the federal universal service support mechanism under 47 U.S.C. \$254(c), either using its own facilities or a combination of its own facilities and resale, throughout the designated service area; (3) advertise the availability of such services and the charges therefor, using media of general distribution. 47 U.S.C. \$214(e)(1)(A)&(B); and (4) offer Link-Up and Lifeline services as part of its service offerings to low-income subscribers. See 47 C.F.R. \$854.405 and 54.411.

47 U.S.C. §214(e)(2) establishes the process for the designation of eligible telecommunications carriers:

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest. (Emphasis added).

The nine (9) supported services which the ETC applicant must provide are: voice grade access to the public switched telephone network; local usage; dual-tone multi-frequency (DTMF) signal or its functional equivalent; single party service or its functional equivalent; access to emergency services; access to operator services; access to interexchange services; access to directory assistance; and toll limitation for qualifying low-income customers. See, 47 C.F.R. §54.101(a). The applicant also must advertise the availability of these services throughout its service territory. If the incumbent local exchange carrier is a rural telephone company, the applicant seeking ETC status also must demonstrate that designating it as an ETC is in the public interest.

The Public Service Commission adopted general criteria for the advertising requirement in its Order of May 4, 2001, in Case No. 00-1656-T-PC, Gateway Telecom, LLC, dba StratusWave Communications, as follows:

- 1. The carrier must advertise in media targeted to the general residential market throughout its service area;
- 2. Such advertising should be placed in media substantially similar to the media in which the serving incumbent LEC advertises its services in the particular service area. This may mean newspaper or local magazine advertisements where the incumbent advertises its services in such publications, or use of broadcast media (radio or television) where the incumbent uses such media;
- 3. The carrier is required to maintain an Internet site where members of the public can obtain information regarding its services and rates; and
- 4. The carrier is required to advertise its services at least quarterly throughout the service areas for which it has been designated an ETC.

In this proceeding, the Joint Stipulation and Agreement for Partial Settlement resolves most of the issues regarding whether or not Easterbrooke provides the nine supported services. The parties to this proceeding have stipulated that Easterbrooke provides all of the supported services with the exception of access to the public switched telephone network, a stipulation to which Frontier would not agree. There also is no dispute that Easterbrooke advertises its services in a manner consistent with the Commission's decision in <u>Gateway</u>, <u>supra</u>. As a result of the Joint Stipulation and Agreement for Partial Settlement, there are two principal issues to be addressed in this case, whether or not Easterbrooke provides access to the public switched telephone network, one of the nine supported services which must be provided by an applicant for ETC designation, and whether the designation of Easterbrooke as an ETC in Frontier's study areas is in the public interest.

The FCC's regulations on the service area of an ETC are contained in 47 C.F.R. §54.207, as follows:

- (a) The term service area means a geographic area established by a state commission for the purpose of determining universal service obligations and support mechanisms. A service area defines the overall area for which the carrier shall receive support from federal universal service support mechanisms.
- (b) In the case of a service area served by a rural telephone company, service area means such company's "study area" unless and until the Commission [the FCC] and the states, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c) of the Act, establish a different definition of service area for such company.
- (c) If a state commission proposes to define a service area served by a rural telephone company to be other than such company's study area, the Commission will consider that proposed definition in accordance with the procedures set forth in this paragraph.

### ACCESS TO THE PUBLIC SWITCHED TELEPHONE NETWORK

Frontier is asserting that Easterbrooke does not provide access to the public switched telephone network because Easterbrooke has not entered into an interconnection agreement with Frontier. Rather, Easterbrooke routes its telecommunications traffic through its existing T-1 facilities to access tandems operated by Verizon. All of the traffic between Frontier and Easterbrooke is transported and terminated in this (Easterbrooke Ex. 1, p. 3; Tr., pp. 28-30, 38-40). However, Easterbrooke and the CAD both pointed out that there is no federal or state requirement that Easterbrooke and Frontier have a direct interconnection for the purpose of transporting traffic. 47 C.F.R. §§54.101 defines the nine supported services. Voice grade access to the PSTN is defined as "a functionality that enables a user . . . to transmit voice communications, including signaling the network that the caller wishes to place a call, and to receive voice communications, including receiving a signal indicating there is an incoming call." Nothing in this definition requires direct connection between the providers. Neither Easterbrooke nor Frontier has any knowledge of any complaint that customers of either carrier are unable to make local calls to or receive calls from customers of the other carrier. (Tr., pp. 39, 137, 140).

After the hearing, Counsel for Frontier filed a letter with the Commission indicating that Frontier actually had opened in its switches the 642, 644 and 651 NXX codes used by Easterbrooke, but has not opened the 704 NXX code used by Easterbrooke and will not do so until Easterbrooke enters into an interconnection agreement with Easterbrooke noted in its reply brief that Easterbrooke has not yet implemented the 704 NXX code, so the fact that this code is not open in Frontier's switch would not affect customer traffic. It was also noted in both Easterbrooke's initial and reply briefs that, subsequent to the hearing, Frontier tendered an interconnection agreement to Easterbrooke, which Easterbrooke is in the process of reviewing. Now that Frontier has requested an interconnection agreement with Easterbrooke, Section 251 of the Act will require Easterbrooke to enter into such an agreement. the testimony at hearing noted, if Easterbrooke and Frontier are unable to negotiate terms of a reasonable interconnection agreement, the matter can be brought before the Public Service Commission for arbitration.

In any event, it seems clear that Easterbrooke was not required to have a direct interconnection with Frontier, at least until Frontier requested that it enter into an interconnection agreement. The traffic between Easterbrooke's customers and Frontier's customers is obviously traveling and being terminated appropriately since neither carrier has received any complaints. There can be no legitimate question that Easterbrooke provides access to the public switched telephone network.

### PUBLIC INTEREST TEST

By far, this issue generated the bulk of the testimony and argument in this proceeding. Both Frontier and the CAD advocate a public interest test that looks not at the local area that is being served by the applicant for ETC status and the additional area that could be better served if it was granted ETC status, but, instead, at a broader analysis of the health and longevity of the high cost universal service fund itself. It is clear from recent decisions of the FCC that the growth in the universal service fund is an item to be considered; however, it is equally clear that the FCC has not adopted the rather broad public interest test relied upon by Frontier and the CAD. The FCC,<sup>2</sup> in its decisions on whether or not to designate applicants for ETC status, has relied upon a more local analysis of the public interest as advocated in this proceeding by Easterbrooke. See, for example, Virginia Cellular, LLC, Docket 96-45, FCC 03-338, (Rel. January 22, 2004), Paras. 28, 29 and 30; Highland Cellular, Inc., CC Docket 96-45, FCC 04-37, (Rel., April 24, 2004), Paras. 22-27. In this proceeding, the undersigned will follow the lead of the FCC and analyze the public interest of the territory covered by the application.

Easterbrooke's testimony indicated that, with ETC status, it will enhance its network through the operation of additional cell towers, provide customers with advanced services and the highest quality of service and provide competitive telecommunications services to rural West Virginia. Easterbrooke further asserts that, with USF funding, it will be able to greatly improve its service to rural or remote areas and reduce or eliminate "dead spots" in its current coverage due to terrain or prorogation characteristics, by constructing new cells and installing repeaters and extenders, as well as by incorporating emerging and innovative technologies. (See, Easterbrooke Exhibit 1, pp. 4-5).

Additionally, cellular providers in this area generally, and Easterbrooke specifically, are required to address the unique engineering and financial challenges posed by the existence of the National Radio Quiet Zone in this service territory, an issue which does not affect wireline carriers. The Quiet Zone encompasses an area of approximately 13,000 square miles and was designed to minimize possible harmful interference with the National Radio Astronomy Observatory at Green Bank, West Virginia, and the Naval Radio Research Observatory at Sugar Grove, West Virginia. There are significant restrictions and limitations upon construction and operation of new or modified radio transmission sites in the Quiet Zone, and, as a result of these restrictions and limitations, there is dramatically reduced effective radiated power for any sites in that Quiet Zone that are approved for transmission. Restrictions also impact location and antenna configuration. As a result, CMRS carriers affected by the Quiet Zone have significantly higher coverage costs than they otherwise would experience, with significantly reduced signal strength, resulting in reduced service capabilities. (Easterbrooke Exhibit 1, pp. 5-6). Easterbrooke has taken what steps it can take before the FCC in order to expand construction within the Quiet Zone, but the additional infrastructure that Easterbrooke can install with USF funding will allow it to overcome those Quiet Zone difficulties to some degree.

<sup>&</sup>lt;sup>2</sup>In the event that the State Commission does not have authority to designate eligible telecommunications carriers, applicants for ETC status may petition the FCC for designation, upon a showing that the state Commission who would normally have jurisdiction over the territory does not have authority to make the designation. 47 U.S.C. §214(A)(2); 47 CFR Section 54.201(a).

Further, Easterbrooke's service territory, WV RSA 5, has a low population density, extremely challenging terrain and low incomes and high poverty levels, which render it more difficult for Easterbrooke to provide broad coverage and reliable service. (Easterbrooke Exhibit 1, pp. 4&7). According to Easterbrooke, it will be able to construct new facilities in the rural high-cost areas of WV RSA 5 and improve service in those areas where signal strength is weak due to topography. Improved telecommunications infrastructure will facilitate commercial and residential development in sparsely populated areas and spur economic development. (Easterbrooke Exhibit 1, p. 7).

A comparison of Easterbrooke's service offerings and rate plans with Frontier's tariffs on file with the Commission indicate that Easterbrooke will be able to offer customers in WV RSA 5 with a larger local calling area than Frontier offers under its rate plans, since Easterbrooke's home calling area under all of its plans includes the eight counties in the WV RSA 5, Braxton, Clay, Nicholas, Pocahontas, Randolph, Tucker, Upshur and Webster. Calls placed from within the home area to anywhere in West Virginia incur no additional toll or long distance charges, although offnetwork roaming charges can apply. (Easterbrooke Exhibit 1, pp. 9-10; Frontier's tariff on file with the Commission). Easterbrooke witness McGaw also noted that Easterbrooke can offer quality affordable service to consumers in areas where landline service is unavailable. (Easterbrooke Exhibit 1, p. 12). Mr. McGaw noted that the availability of a portable high quality wireless service is especially important for health and safety in rural areas where wireline service may be physically unavailable. (Easterbrooke Exhibit 1, p. 12).

Easterbrooke witness Wood made the point that the existence of competitive options for telecommunications service, particularly the availability of wireless service, is important for rural economic development and that, when making decisions on whether or not to locate their facilities in a given area, businesses consider the availability of reliable voice services, data services and wireless services with sufficient coverage. He argued that rural areas require these services to be able to compete with urban and suburban areas to attract investment and jobs. (Easterbrooke Exhibit 2A, pp. 6-7). He also emphasized that reliable mobile communications have a level of importance for people who live in rural areas that people living in urban areas fail to appreciate. He noted that even the highest quality wireline service is no substitute for mobile service with broad geographic coverage, because the wireline service often physically is not there when it is needed. (Easterbrooke Exhibit 2A, p. 7).

In the past, the Public Service Commission, on the basis of the language of the Telecommunications Act of 1996 and earlier FCC decisions, was able to conclude that the public interest test for an ETC applicant in an RTC territory was met simply on the basis of increased choices in technology, services and prices for consumers. (See, <u>Fibernet</u>, <u>LLC</u>, Case No. 01-0488-T-PC). While these factors may still be considered, they can no longer be the exclusive basis upon which an ETC designation in an RTC territory can be made.

In its most recent pronouncement on the subject, in its <u>Highland</u> Cellular decision (Rel. April 12, 2004), the FCC noted that, in determin-

ing whether or not the designation of an applicant as an ETC will serve the public interest, it must consider whether the benefit of an additional ETC in the subject wire centers outweighs any potential harms. The FCC further noted that this balancing of benefits and costs is a fact-specific exercise. Among other elements, the FCC weighed the benefits of increased competitive choice, the impact of the designation on the universal service fund, the unique advantages and disadvantages of the competitor's service offerings, any commitments made regarding the quality of telephone service and the competitive ETC's ability to satisfy its obligation to serve the designated service areas within a reasonable timeframe. (Highland Cellular, Par. 22).

In the <u>Highland Cellular</u> proceeding, the FCC noted that Highland Cellular's service offerings would provide benefits to customers in situations where they do not have access to a wireline telephone and that the mobility of Highland Cellular's wireless service would provide other benefits to customers. The FCC noted that the mobility of telecommunications assists consumers in rural areas who must drive significant distances to places of employment, stores, schools and other critical locations. Further, the availability of a wireless service offering provides access to emergency services that can "mitigate the unique risk of geographic isolation associated with living in rural communities." (Highland Cellular, Para. 23). The FCC also noted that, because the cellular ETC applicant's local calling area was larger than those of the ILECs with which it would compete, its customers will be subject to fewer toll charges. The FCC noted that the applicant had given assurances that it would alleviate "dropped calls" by using universal service support to build new towers and facilities to offer better coverage. (Highland Cellular, Para. 24). All of the factors considered important by the FCC in the <u>Highland Cellular</u> opinion are supported by Easterbrooke's testimony in this proceeding. It is significant to the undersigned that neither Frontier nor the CAD even bothered to attempt to rebut these portions of Easterbrooke's testimony; yet, they are among the most critical pieces of testimony in the record.

The FCC's analysis of the impact of the ETC designation on the Universal Service Fund was also interesting, and significantly different from the ones advocated by either the CAD or Frontier. The FCC acknowledged the concerns regarding growth in the Universal Service Fund and the ever-increasing amounts paid out in high cost support to competitive ETCs. The FCC also referenced the on-going examination by it and the Joint Board of the FCC's rules relating to high cost universal service support in competitive areas. However, the specific analysis conducted

<sup>&</sup>lt;sup>3</sup>A word should be said about the Recommended Decision of the Federal-State Joint Board on Universal Service released on February 27, 2004. That Recommended Decision is simply the recommendations of the Joint Board to the FCC and carries no actual precedential value. In those recommendations, the Joint Board makes recommendations to address the increasing level of payments to competitive ETCs from the high cost fund and asks the FCC to consider several issues. That Recommended Decision was issued three days after the <u>Highland Cellular</u> opinion was adopted. However, given that <u>Highland Cellular</u> wasn't released until April 12, 2004, it would appear that the FCC may have been considering whether to

by the FCC on the impact of an additional ETC on the Universal Service Fund was not based on the overall growth in the fund or the level by which payouts to competitive ETCs have grown in the past few years as advocated by Frontier. Further, the FCC did not engage in the study area/loop support analysis recommended by the CAD. Instead, the FCC attempted to estimate the impact on the Universal Service Fund of granting the individual application and, obviously, concluded that the impact would not be significant. (See, <u>Highland Cellular</u>, Para. 25 and fn. 73).

The type of information utilized by the FCC in this particular analysis was not provided by any party in this case, since Highland Cellular, and the Virginia Cellular case previously referenced, were issued subsequent to the hearing in this matter and the parties did not have access to the FCC's most recent thoughts on the issue in preparing their prefiled testimony or in the testimony and cross-examination engaged in at the hearing. However, a review of some of the more generally available information from the Universal Service Administrative Company regarding high cost support can be helpful. For the first quarter of 2004, the USAC is projecting total high cost support on an annualized basis of \$3.5 billion dollars. Of that amount, West Virginia carriers would receive approximately \$82.2 million or approximately 2.3% of the total projected high cost support to be paid out in 2004. (See, Appendix HC02, 10 2004, Universal Service Administrative Company). That same Appendix indicates that, for 2004, it is projected that West Virginia will receive the 19th highest level of support from the fund. The largest amount will be paid out to Texas, over \$211 million dollars. West Virginia is projected to receive approximately \$2 % million less than the amount paid out to a sister state, Virginia, the state in which both Highland Cellular and Virginia Cellular were designated as ETCs by the FCC in 2004.

Based on the information in the record on the tangible benefits to be gained by the customers in WV RSA 5 from Easterbrooke's ETC designation, and the obvious lack of substantive impact of the designation of Easterbrooke as an ETC on the overall Universal Service Fund, the undersigned concludes that Easterbrooke has met its public interest test with respect not only to the issue of impact on the Universal Service Fund, but also with respect to the more fact-specific analysis regarding the service territory for which it is seeking °ETC designation.

In the <u>Highland Cellular</u> proceeding, as in the <u>Virginia Cellular</u> proceeding, the FCC noted that each applicant had agreed to comply with the Cellular Telecommunications Industry Association (CTIA) Consumer Code for Wireless Service, which sets out certain principals, disclosures and practices for the provision of wireless service. Under that Consumer Code, wireless carriers agree to disclose rates and terms of service to customers; provide maps showing where service is generally available;

modify its opinion at all to incorporate any reference to the Joint Board's recommendations. However, the opinion that was released on April 12, 2004, makes no reference to the Joint Board's Recommended Decision and simply uses the same general language concerning growth in the Fund that was included in the <u>Virginia Cellular</u> opinion released on January 22, 2004.

provide contract terms to customers and confirm changes in service; allow a trial period for new service; provide specific disclosures in advertising; separately identify carrier charges from taxes on billing statements; provide customers the right to terminate service for changes to contract terms; provide ready access to customer service; promptly respond to customer inquiries and complaints received from government agencies; and abide by policies for the protection of consumer privacy. The CTIA Consumer Code was not mentioned by any party in this proceeding, but the undersigned believes that it represents a fairly reasonable level of service and commitment to a cellular telephone company's customers. Accordingly, the undersigned believes that it is reasonable to impose a requirement upon a wireless applicant for ETC designation in West Virginia that it agree to comply with the provisions of the CTIA Consumer Code. Therefore, that requirement will be imposed upon Easterbrooke in this proceeding.

With that requirement, the undersigned concludes that, since Easterbrooke is providing the nine services supported by the Universal Service Fund; has committed to comply with the advertising requirements established by the Commission in <u>Gateway</u>; has agreed to comply with other potential restrictions and conditions based upon the West Virginia Public Service Commission's own <u>Highland Cellular</u> proceeding, pending before the Commission on exceptions, in Case No. 02-1465-T-PC; and has demonstrated that it is in the public interest to designate it as an ETC, it is reasonable to designate Easterbrooke Cellular Corporation as an eligible telecommunications carrier within its service territory of WV RSA 5, with certain amendments and conditions described below.

# ETC Service Area For Easterbrooke

While not major issues in this proceeding, there are some small issues relating to the exact contour of the service area to be included in Easterbrooke's ETC designation. As noted previously in this Discussion section, generally speaking, the service area for an ETC in RTC territory is the RTC's entire study area, as previously defined, unless both the state and the FCC approve a different service area pursuant to federal regulations. (See, 47 U.S.C. §214(e)(5); 47 C.F.R. §54.207).

Easterbrooke requested ETC designation for its entire service territory of WV RSA 5, encompassing eight counties in West Virginia. Easterbrooke had previously been designated as an ETC for the portion of its licensed territory served by Verizon, a non-rural telecommunications carrier. The instant petition covers the remainder of its licensed territory in West Virginia within portions of Frontier's Mountain State and St. Mary's study areas. However, the boundaries of the specific Frontier wire centers covered by Easterbrooke's petition in this case do not conform precisely to the boundary of WV RSA 5 in two instances. As noted in CAD Exhibits 2 and 2A, Exhibit BJG-1, Frontier's Walkersville wire center serves a portion of northern Braxton County where Easterbrooke is licensed, but mainly serves southern Lewis County where Easterbrooke does not have a license, while the Thomas and Davis wire centers in Tucker County serve the western portion of Grant County, which also is not included in WV RSA 5.

CAD has recommended that the Commission specify that Easterbrooke is granted ETC status within the entire boundaries of designated wire centers, whether the boundaries of those wire centers extend beyond the boundary within which Easterbrooke is licensed to provide wireless service. The CAD noted in its Initial Brief that Easterbrooke's wireless signal extends beyond the boundaries of the eight counties within which it is licensed to provide wireless service as verified by Exhibit B of Easterbrooke Exhibit 1, the coverage map attached to Mr. McGaw's testimony. The CAD also noted that, in order to provide the supported services, Easterbrooke is not limited to providing wireless service, but may provide service through the resale of wireline or other wireless services. In order to accomplish the goal of providing service to the entire wire centers for which it is receiving ETC the CAD is recommending that the Commission direct designation, Easterbrooke to either obtain a certificate of convenience and necessity to provide telecommunications service in those portions of the wire centers in question that lie beyond its licensed boundaries or withdraw its petition with respect to those particular wire centers, as AllTel did previously before the Commission. (See, Tr., pp. 95-98 and CAD Initial Brief, p. 12).

Initially, the undersigned had grave reservations regarding this aspect of the CAD recommendation, given that the boundaries of the wireless service territories were determined at the federal level. Further, in previous decisions, the FCC had not required wireless ETC applicants to serve outside of their licensed service territories. (See, for example RCC Holdings ETC Designation Order, CC Docket No. 96-45, DA 02-3181, (rel. November 27, 2002)). However, in the <u>Virginia Cellular</u> Memorandum Opinion and Order released on January 22, 2004, and the Highland Cellular Memorandum Opinion and Order released on April 12, 2004, the FCC appeared to modify its position on this issue. Virginia Cellular, the FCC spoke approvingly of Virginia Cellular's own amendment to its petition, which provided that, although the boundaries of its CMRS licensed service area in Virginia excluded a small part of the Williamsville wire center in the study area of MGW, Virginia Cellular had committed to offer service to customers in the entirety of the Williamsville wire center through a combination of its own facilities and the resale of either wireless or wireline services. (See, Para. 37).

In <u>Highland Cellular</u>, the FCC went the extra step and concluded that making an ETC designation for a portion of an RTC's wire center is inconsistent with the public interest. Particularly, the FCC concluded that, prior to designating an additional ETC in an RTC service area, the competitor must commit to provide the supported services to customers throughout a minimum geographic area. The FCC concluded that a rural telephone company's wire center is an appropriate minimum geographic area for ETC designation. (See, <u>Highland Cellular</u>, Memorandum Opinion and Order, CC Docket No. 96-47, FCC 04-37, (rel. April 12, 2004)).

It is true that, in <u>Highland Cellular</u>, the FCC stated that a wire center is an appropriate minimum geographic area because rural carrier wire centers typically correspond to county and/or town lines, which, in the instant proceeding, is exactly the opposite. The wire centers in question extend beyond county lines and do not appear to reflect specific community geographic boundaries. Nevertheless, the undersigned concludes

that the FCC reasoning is still appropriate for this proceeding, particularly when looked out in conjunction with the CAD's arguments for requiring that the competitive carrier commit to providing service throughout a rural carrier's wire center, such as the avoidance of administrative and service-related problems that could occur if Easterbrooke were designated as an ETC in less than an entire wire center.

In the Highland Cellular proceeding, the FCC noted that Highland Cellular had stated in that case that, should the FCC impose a requirement that competitive ETCs serve complete rural telephone company wire centers, it would not seek designation in the specific wire center at In the instant proceeding, Easterbrooke will be given the option of either withdrawing the Thomas, Davis and Walkersville wire centers from its requested ETC designated territory or obtaining a certificate of convenience and necessity from the Commission to serve the specific portions of Lewis County and Grant County for which it does not have authority at this time. Given the very specific location of the territory in question, the undersigned would not expect that Easterbrooke would be required to fulfill the statewide publication requirement usually imposed upon applications for telecommunications certificates of convenience and necessity, but, instead, would be required to publish notice of its application in only Lewis and Grant Counties. event, Easterbrooke will be required to serve either all of the Walkersville, Thomas and Davis wire centers or be granted ETC designation in no part of them.

Also with respect to Easterbrooke's service area for ETC purposes, Frontier has argued that allowing Easterbrooke to serve anything less than the entirety of the St. Mary's and Mountain State study areas amounts to allowing Easterbrooke to cream skim Frontier's service territory. The FCC has previously concluded that, when a CMRS licensed cellular provider seeks ETC designation for the entirety of its licensed service area, there can be a presumption that it is not attempting to cream skim, because it is attempting to obtain ETC designation for all points in the service territory which it has. Further, the FCC has concluded that, when a rural telephone company has filed a disaggregation plan with the FCC, so that its high-cost support is targeted principally to its high-cost wire centers, as has been done by Frontier, concerns about cream skimming are significantly minimized and reduced. (See, i.e., Virginia Cellular, Para. 32, and Highland Cellular, Para. 26. See also, RCC Holdings, Para. 31).

The FCC's cream skimming analysis involves an assessment of population density and whether or not the wire center is high cost or low cost. With respect to the wire centers in the St. Mary's study area, Easterbrooke is seeking ETC designation in two low-cost wire centers, five medium-cost wire centers and two high-cost wire centers, while, in the Mountain State study area, Easterbrooke is seeking designation in six medium-cost wire centers and three high-cost wire centers. These wire centers are all contiguous and all make up WV RSA 5. (Frontier Exhibit 2, attached Exhibit 3; CAD Exhibit 2, Exhibit BJG-1). The undersigned concludes that Easterbrooke is not attempting to cream skim Frontier's service territory and that granting ETC designation in the specified wire

centers will not permit cream skimming by Easterbrooke, since it is obliqued to serve all areas and all customers within its designation.

Frontier also argued that Easterbrooke should be required to serve all wire centers within the Mountain State and St. Mary's study areas. However, the FCC has concluded that requiring a carrier to serve a non-contiguous service area as a prerequisite of eligibility might impose a serious barrier to entry, particularly to wireless carriers. (See, Universal Service Order, 12 FCC Rcd 8882, Para. 190). Additionally, in the Virginia Cellular Memorandum Opinion and Order, the FCC declined to require Virginia Cellular to serve other non-contiguous wire centers in the study areas for which it was receiving ETC designation. (See, Virginia Cellular, Para. 38).

It should also be noted that, to a certain extent, both Frontier and the CAD in this case have attempted to elevate the boundaries of a study area to some sort of mystical importance. As Mr. Gregg explained in his testimony, the study areas simply reflect the service territories of the previous holders of Frontier's certificated service territory in West Virginia, with the Bluefield study area representing the territories previously served and certificated for General Telephone Company of the Southeast; the Mountain State study area reflecting the areas previously served by AllTel; and the St. Mary's study area reflecting the service territory previously held by Contel. Before Contel and AllTel, there were any number of smaller telecommunications companies in West Virginia whose service territories were slowly acquired and combined by different providers of service, such as Mountain State Telephone Company, Preston Telephone Company, Telephone Utilities of West Virginia, Tygart Valley Telephone Company and West Virginia Telephone Company. While it is true that universal service support is flowed through on a study area basis, given the actual meaning of what study areas are and how they were derived, and further given Frontier's disaggregation plan, which targets its universal service support to higher-cost exchanges and away from lower-cost exchanges within the study areas, the undersigned is not convinced that any study area analysis is really appropriate, at least where the study areas are large and non-contiquous.

The undersigned is particularly disturbed by the CAD's public interest analysis regarding per line support by study area as a means for determining whether or not additional ETC designations should be granted Because the Mountain State study area receives in RTC study areas. \$37.76 per line in monthly high-cost support, and because that monthly amount per line was significantly in excess of either the Verizon or Frontier average residential rate or the national average residential rate, the CAD concluded that the Mountain State study area was so costly to serve that it could not support an additional ETC designation. CAD's analysis completely ignored the fact that Frontier disaggregated its universal service support so that the amount of per line support on a study area average is of relatively little significance or importance in making substantive determinations on ETC petitions involving any of Frontier's study areas. The peculiarities of the CAD's argument can be fully appreciated when comparing the CAD's recommendation with respect to Easterbrooke's petition in Frontier's Mountain State study area to its recommendation on Hardy Telephone Company's ETC petition in Moorefield Exchange in Frontier's Bluefield study area, in Case No. 030305-T-PC, which decision is being issued contemporaneously with this decision. The high cost support per line for the Moorefield Exchange is \$37.01, very close to the Mountain State study area monthly high cost support level. However, because the Bluefield study area as a whole only receives \$11.97 per line per month in support, the CAD recommended that Hardy be granted ETC designation in the Moorefield Exchange regardless of the actual level of high-cost support received by the Moorefield Exchange. It should be noted that the Bluefield study area encompasses wire centers from the very southern part of the state along the Virqinia/West Virginia border in Mercer County, and wire centers in Jefferson County at the extreme tip of the eastern panhandle, which are Frontier's most densely populated exchanges. Given the disaggregation of Frontier's USF support, the CAD's study area analysis really makes no sense. Further, given the conclusion of the FCC that it is the overall impact of the individual ETC petition on the Universal Service Fund that it will look at, at least in the foreseeable future, the undersigned is of the opinion that the CAD's study area analysis is misplaced.

Finally, the undersigned believes that there are certain policy issues relating specifically to the regulation provided by the Public Service Commission of West Virginia under the statutory scheme set forth in Chapter 24 of the West Virginia Code which no party to this proceeding has addressed. Under West Virginia Code \$24-2-11(a), no public utility, person or corporation may begin the construction of any plant, equipment, property or facility for furnishing any of the services under the jurisdiction of the Public Service Commission nor apply for nor obtain any franchise, license or permit from any municipality or other governmental agency unless and until the Public Service Commission finds that the public convenience and necessity require the proposed service, construction, etc. The certificates granted to Frontier, Hardy and any other telecommunications provider in the State of West Virginia, whether they are wireless carriers or wireline carriers, interexchange carriers or CLECs, are exactly the same and the Commission had to make exactly the same finding of public convenience and necessity in order to grant them, whether or not those findings are explicitly stated in the orders. Given this similarity of certificates, the undersigned finds it discomfiting to be expected to pick and choose among carriers whose certificates have equal standing and whose services the Public Service Commission has already concluded are required by the public convenience and necessity. Denial of ETC designation to any ETC applicant in West Virginia means that the Public Service Commission is automatically placing that carrier at a financial and competitive disadvantage relative to the incumbent local exchange carrier and, possibly, previously granted ETC designees, by denying subsequent ETC applicants the same access to Universal Service Funding support as it granted to prior ETC designees or the incumbent providers. Once the Public Service Commission has concluded that the public convenience and necessity require a particular service, the undersigned is hard-pressed to understand under what legal basis under Chapter 24 of the West Virginia Code the Commission then makes an affirmative decision to discriminate between those providers by denying access to subsidy funds to some, while granting it to others.

## FINDINGS OF FACT

- 1. Easterbrooke Cellular Corporation, doing business as Cellular One, has requested that the Public Service Commission designate it as an eligible telecommunications carrier, pursuant to Section 214(e)(2) of the Communications Act of 1934, as amended, in order for Easterbrooke to receive support from the Federal Universal Service Fund in those areas of Easterbrooke's service territory served by Citizens Telecommunications Company of West Virginia, doing business as Frontier Communications of West Virginia, a rural telephone company. (See, CAD Exhibit 1).
- 2. In order to be designated as eligible telecommunications carrier, an applicant must be a common carrier; offer the nine services supported by the Federal Universal Service Support mechanism under 47 U.S.C. §254(c), either using its own facilities or a combination of its own facilities and resale, throughout the designated service area; advertise the availability of such services and the charges therefor, using media of general distribution; and offer Link-Up and Lifeline services (known as Tel-Assistance services in West Virginia) as part of its service offers to low-income subscribers. (See, 47 U.S.C. §214(e)(1)(A)(B); 47 C.F.R. §§54.405 and 54.411).
- 3. The parties to this proceeding have stipulated that Easterbrooke is a common carrier; provides eight of the nine supported services; advertises its services in media of general distribution throughout its service territory; and will offer Lifeline and Link-Up service upon being designated as an ETC. (Joint Exhibit 1).
- 4. The parties also agreed to various other conditions in the Joint Stipulation and Agreement for Partial Settlement, some of which are self-implementing and some of which are dependent upon the Commission's final, non-reviewable decision in Case No. 02-1453-T-PC, <u>Highland Cellular, Inc.</u>, currently pending before the Commission on exceptions. (See, Joint Exhibit 1).
- 5. Because of Frontier's objection, the parties did not stipulate that Easterbrooke provides access to the public switched network. (Joint Exhibit 1).
- 6. Easterbrooke is the original FCC Frequency Block A Cellular Licensee for WV RSA 5, comprised of Braxton, Clay, Nicholas, Webster, Pocahontas, Randolph, Upshur and Tucker Counties. Easterbrooke has constructed 39 cellular towers and will continue to add more sites as business conditions warrant. All of Easterbrooke's cellular sites are connected by its existing T-1 lines and microwave links to Easterbrooke's switch in Elkins, West Virginia, which, in turn, is connected to the public switched telephone network pursuant to Easterbrooke's interconnection agreement with Verizon. (Easterbrooke Exhibit 1, p. 3).
- 7. Frontier is a local exchange carrier providing service to customers in 34 of West Virginia's 55 counties. It has three designated study areas, Bluefield, St. Marys and Mountain State. Frontier also is a rural telephone company in each of those study areas and has filed a Universal Service Fund disaggregation plan for each study area, which simply means that high-cost support is targeted away from low-cost wire

centers and directed to high-cost wire centers. Frontier is the incumbent local exchange carrier and carrier of last resort in its three study areas. It has been designated as an ETC and receives Universal Service Funds in all three of its study areas. (Frontier Exhibit 2, pp. 4-5).

- 8. Easterbrooke routes its telecommunications traffic through its existing T-l facilities to access tandems operated by Verizon. All traffic between Frontier and Easterbrooke is transported and terminated in this way. Neither Easterbrooke nor Frontier has any knowledge of any complaint that customers of either carrier are unable to make local calls to or receive calls from customers of the other carrier. (Easterbrooke Exhibit 1, p. 3; Tr., pp. 28-30, 38-40, 137 and 140).
- 9. There is no federal or state requirement that Easterbrooke and Frontier have a direct interconnection for the purpose of transporting traffic, in the absence of a request by Frontier that Easterbrooke negotiate an interconnection agreement with it. (See, 47 U.F.C. §251; 47 C.F.R. §54.101).
- 10. Subsequent to the hearing, Frontier filed a letter with the Commission indicating that certain NXX codes used by Easterbrooke have been opened by Frontier in its switches, although one NXX code, not currently used by Easterbrooke, has not been opened and will not be opened unless Easterbrooke enters into an interconnection agreement with Frontier. Also subsequent to the hearing, Frontier actually tendered a proposed interconnection agreement to Easterbrooke, which Easterbrooke was reviewing at the time of briefing in this matter. (See, Frontier letter filed February 24, 2004; Easterbrooke Initial Brief, p. 6).
- 11. In addition to the requirements which all ETC applicants must meet under 47 U.S.C. \$214(e), applicants for ETC designation in rural telephone company service areas must also demonstrate that their designation as an ETC in such an area is in the public interest. (47 U.S.C. \$214(e)(2)).
- 12. In making its own determinations on whether or not to designate additional ETCs in RTC study areas, the Federal Communications Commission has determined that the public interest determination is a fact-specific exercise, in which it must weigh the benefits of increased competitive choice, the impact of the designation on the Universal Service Fund, the unique advantages and disadvantages of the competitor's service offerings, any commitments made regarding the quality of telephone service and the competitive ETC's ability to satisfy its obligation to serve the designated service areas within a reasonable time frame. (See, Highland Cellular, Memorandum Opinion and Order, Docket 96-45, FCC 04-37, (Rel., April 24, 2004); Virginia Cellular, LLC, Memorandum Opinion and Order, Docket 96-45, FCC 03-338, (Rel., January 22, 2004)).
- 13. If Easterbrooke is granted ETC designation, it is committed to enhancing its network through the operation of additional cell towers, providing customers with advanced services and a higher quality of service and providing competitive telecommunications services to rural West Virginia. Easterbrooke also asserted that, with the USF funding, it will be able to greatly improve its service to rural or remote areas and

reduce or eliminate "dead spots" in its current coverage due to terrain or propogation characteristics, by constructing new cells and installing repeaters and extenders, as well by incorporating emerging and innovating technologies. (Easterbrooke Exhibit 1, pp. 4-5).

- 14. Cellular providers in the eastern portion of West Virginia and, particularly, Easterbrooke in WV RSA 5 are required to address the unique engineering and financial challenges posed by the existence of the National Radio Quite Zone in their service territories, an issue which does not affect wireline carriers. The Quite Zone encompasses an area of approximately 13,000 square miles and was designed to minimize possible harmful interference with the National Radio Astronomy Observatory at Green Bank, West Virginia, and the Naval Radio Research Observatory at Sugar Grove, West Virginia. (Easterbrooke Exhibit 1, p. 5).
- 15. Significant restrictions and limitations upon construction and operation of new or modified radio transmission sites are imposed in the Quite Zone, which dramatically reduce effective radiated power for any sites in the Quite Zone that are approved for transmission. Restrictions also impact location and antenna configuration. As a result, CRMS carriers affected by the Quite Zone have significantly higher coverage costs than they otherwise would experience, with significantly reduced signal strength, resulting in reduced service capabilities. (Easterbrooke Exhibit 1, pp. 5-6).
- 16. Easterbrooke has taken all of the steps it can before the Federal Communications Commission in order to expand construction within the Quite Zone, but the additional infrastructure that Easterbrooke can install with USF funding will allow it to overcome the Quite Zone difficulties, to some degree. (Easterbrooke Exhibit 1, pp. 6-7).
- 17. Easterbrooke's service territory, WV RSA 5, has a low population density, extremely challenging terrain and low-incomes and high poverty levels, which render it more difficult for Easterbrooke to provide broad coverage and reliable service. USF funding will enable Easterbrooke to construct new facilities in the rural high-cost areas of WV RSA 5 and improve service in those areas where signal strength is weak due to topography. Improved telecommunications infrastructure will also facilitate commercial and residential development in sparsely populated areas and spur economic development. (Easterbrooke Exhibit 1, p. 7).
- 18. Easterbrooke will be able to offer customers in WV RSA 5 a larger calling area and the possibility of lower toll charges than Frontier is able to offer under its rate plans, since Easterbrooke's home calling area under all of its rate plans includes all eight counties in WV RSA 5. Calls placed from within the eight-county home area to anywhere in West Virginia incur no additional toll or long distance charges, although off-network roaming charges can apply. (Easterbrooke Exhibit 1, pp. 9-10).
- 19. Easterbrooke can offer quality affordable cellular service to customers in areas where landline service is unavailable. The availability of a high-quality wireless service is especially important for health and safety reasons in rural areas where wireline service may be physically unavailable. (Easterbrooke Exhibit 1, p. 12).

- 20. The existence of competitive options for telecommunication service, particularly the availability of wireless service, is important for rural economic development. When making decisions on whether or not to locate their facilities in a given area, businesses consider the availability of reliable voice services, data services and wireless services with sufficient coverage. Rural areas require these services in order to be able to compete with urban and suburban areas in attracting investment and jobs. (Easterbrooke Exhibit 2A, pp. 6-7).
- 21. Reliable mobile communications have a high level of importance for people who live in rural areas. The highest quality wireline service is no substitute for mobile services with broad geographic coverage, simply because the wireline service physically may not be there when it is needed, in a rural area. (Easterbrooke Exhibit 2A, p. 7).
- 22. In determining whether or not to grant additional ETC designations in RTC study areas, the FCC has noted that cellular service offerings will provide customers benefits in situations where they do not have access to a wireline telephone and that the mobility of wireless service provides other benefits to customers, and is of particular assistance to customers in rural areas who must drive significant distances to places of employment, stores, schools and other critical locations. The FCC has also determined that the availability of a wireless service offering provides access to emergency services that can "mitigate the unique risk of geographic isolation associated with living in rural communities". (See, Highland Cellular, paragraph 23).
- 23. In its determinations on whether or not to grant additional ETC designations in RTS study areas, the FCC has also noted that, because a cellular applicant's local calling area is larger then that of the incumbent local exchange carrier with which it will compete, its customers would be subject to fewer toll charges. Further, the FCC has considered it significant if an applicant has given assurances that it will alleviate dropped calls and "dead spots" by using Universal Service support to build new towers and facilities to offer better coverage. (See, <u>Highland Cellular</u>, paragraph 24).
- 24. Neither Frontier nor the CAD offered testimony to rebut any portion of Easterbrooke's testimony regarding the benefit its designation as an ETC would bring to the specific territory covered by this application, i.e., WV RSA 5. (See, record generally).
- 25. In its determination on whether or not to designate additional ETCs in RTC study areas, while the FCC has acknowledged that the impact of additional ETCs on the Universal Service Fund is a factor to be considered, when it considers that factor, the FCC looks at the impact of the specific ETC applicant on the overall Universal Service Fund, rather than a broader and more general policy analysis. (See, <u>Highland Cellular</u>, paragraph 25 and footnote 73; <u>Virginia Cellular</u>, paragraph 31 and footnote 96).
  - 26. For the first quarter of 2004, the Universal Service Administrative Company is projecting total high-cost support on an annualized basis of \$3.5 billion. Of that amount, West Virginia carriers are expected to receive approximately \$82.2 million, or approximately 2.3% of

the total projected high-cost support to be paid out in 2004. (See, Appendix HCO2, 1Q 2004, Universal Service Administrative Company).

- 27. For 2004, it is projected that West Virginia will receive the nineteenth highest level of support from the fund, and is projected to receive approximately \$2.5 million less than the amount paid out to Virginia, the state in which both Highland Cellular and Virginia Cellular were designated as ETCs by the FCC in 2004. (See, Appendix HC02, 10 2004, Universal Service Administrative Company).
- 28. In its decision on whether or not to grant additional ETC designations in RTC territories for cellular companies, the FCC has placed great store upon each applicant's agreement to comply with the Cellular Telecommunications Industry Association Consumer Code for Wireless Service, which sets out certain principles, disclosures and practices for the provision of wireless service. (See, <u>Highland Cellular</u>, paragraph 43; <u>Virginia Cellular</u>, paragraph 30),
- 29. Generally speaking, the service area for a competitive ETC in RTC territory is the RTC's entire study area, unless and until the state commission and FCC approve a different service area pursuant to federal regulations. (See, 47 U.S.C. §214(e)(5); 47 C.F.R. §54.207).
- 30. The boundaries of Easterbrooke's licensed cellular service territory, WV RSA 5, do not conform precisely to the boundaries of the specific Frontier wire centers covered by Easterbrooke's petition in this case. Frontier's Walkersville wire center serves a portion of northern Braxton County where Easterbrooke is licensed, and which portion is included in Easterbrooke's petition in this case, but mainly serves southern Lewis County where Easterbrooke does not have a license. Frontier's Thomas and Davis wire centers in Tucker County serve the western portion of Grant County, which also is not included in WV RSA 5. (CAD Exhibits 2 and 2A, attached BJG-1; CAD Exhibit 2 and 2A, pp. 11-13).
- 31. In its 2004 determinations on whether or not to designate additional cellular ETCs in RTC service territories, the FCC has determined that the applicant for ETC designation must commit to provide the supported services to customers throughout a minimum geographic area, which the FCC has concluded should be the rural telephone company's wire center. (See, <u>Highland Cellular</u>, paragraph 33).
- 32. The FCC has previously concluded that, when a CMRS licensed cellular provider seeks ETC designation for the entirety of its licensed service territory, there can be a presumption that the applicant is not attempting to cream skim the rural telephone company's service territory, since the applicant is attempting to obtain ETC designation for all points in the service territory which it has. Further, the FCC has concluded that, when a rural telephone company has filed a disaggregation plan with the FCC, so that its high-cost support is targeted principally to its high-cost wire centers, as has been done by Frontier, concerns about cream skimming are significantly minimized and reduced. (See, Virginia Cellular, paragraph 32; Highland Cellular, paragraph 26; RCC Holdings, Inc., Memorandum Opinion and Order, CC Docket No. 96-45, DA 02-3181, (Rel. November 27, 2002), paragraph 31).

- 33. In its petition, Easterbrooke is seeking ETC designation in Frontier's St. Mary's study area in two low-cost wire centers, five medium-cost wire centers and two high-cost wire centers, while, in the Mountain State study area, Easterbrooke is seeking designation in six medium-cost wire centers and three high-cost wire centers. These wire centers are all contiguous and all make up WV RSA 5. (Frontier Exhibit 2, attached Exhibit 3; CAD Exhibit 2, Exhibit BGJ-1).
- 34. In making its determination on whether or not to grant additional ETC designations in an RTC service territory, the FCC has concluded that requiring a carrier to serve a non-contiguous service area as a prerequisite of ETC eligibility might impose a serious barrier to entry, particularly to wireless carriers. (See, <u>Universal Service Order</u>, 12 FCC Rcd. 8882, paragraph 190; <u>Virginia Cellular</u>, paragraph 38).

## CONCLUSIONS OF LAW

- 1. Given the Joint Stipulation and Agreement for Partial Settlement, coupled with the testimony of Easterbrooke witness McGaw regarding the technical aspects of Easterbrooke's operations, it is reasonable to conclude the Easterbrooke is a common carrier; offers eight of the nine supported services, i.e., local usage; dual tone multi-frequency signaling or its functional equivalent; single-party service or its functional equivalent; access to emergency services; access to operator services; access to interexchange services; access to directory assistance; and toll limitations for qualifying low-income customers. Easterbrooke has committed to make its supported services available throughout its designated service area and to advertise the availability of and charges for the supported services throughout its designated service territory.
- 2. It is reasonable to conclude that Easterbrooke offers or is capable of offering the first supported service, i.e., voice-grade access to the public switched telephone network, through its existing T-1 facilities which are interconnected with access tandems operated by Verizon.
- 3. Given the territory-specific evidence presented by Easterbrooke Exhibits McGaw and Wood regarding the specific benefits to be derived by consumers in WV RSA 5 from ETC designation for Easterbrooke as detailed in Findings of Fact 13 through 21, it is reasonable to conclude that granting ETC status to Easterbrooke is in the public interest of the consumers of telecommunications services in WV RSA 5.
- 4. Given the insubstantial impact of granting ETC status to Easterbrooke on the overall Universal Service Fund, it is reasonable to conclude that granting ETC status to Easterbrooke will not harm the Federal Universal Service mechanism and, therefore, the ETC designation for Easterbrooke meets the public interest test required for additional ETC designations in rural telephone company study areas.
- 5. It is reasonable to require Easterbrooke to comply with the Consumer Code for Wireless Service of the Cellular Telecommunications

Industry Association, as a condition of receiving ETC designation in the study areas of Frontier.

- 6. It is reasonable to designate Easterbrooke's service area for ETC purposes as the entirety of WV RSA 5, encompassing portions of Frontier's Mountain State and St. Marys study areas, as permitted under Section 214(e)(5) and 47 C.F.R. §54.207, with certain amendments regarding the partial wire centers included within the boundaries of WV RSA 5.
- 7. Given the FCC's decisions in 2004 in the <u>Virginia Cellular</u> and <u>Highland Cellular</u> opinions, it is reasonable to require Easterbrooke to agree to serve the entirety of any wire centers which are only partially located within WV RSA 5 by obtaining a certificate of convenience and necessity from the Public Service Commission to serve those areas or, in the alternative, to require it to withdraw its request for ETC designation in those partial wire centers. In this proceeding, the wire centers at issue are the Walkersville wire center, serving Braxton and Lewis Counties, and the Thomas and Davis wire centers, serving Tucker and Grant Counties. Within thirty (30) days of the date that this Order becomes final, Easterbrooke shall notify the Public Service Commission and the parties to this proceeding whether it will agree to serve the entirety of those three wire centers or whether it will withdraw those three partial wire centers from its ETC petition.
- 8. A cellular ETC applicant seeking to serve wire centers within a rural telephone company's study area is not required to serve the entirety of the rural telephone company's study areas, particularly if those study areas are noncontiguous geographic territories. <u>Universal Service Order</u>, 12 FCC Rcd. 8882, paragraph 190; <u>Virginia Cellular</u>, paragraph 38.
- 9. An ETC designation for Easterbrooke consisting of the entire territory of WV RSA 5, as amended to include the entirety of the Walkersville, Thomas and Davis wire centers, does not constitute an attempt by Easterbrooke to cream skim Frontier's service territory and will not permit cream skimming by Easterbrooke, since it is obligated to serve all areas and all customers within its ETC designation and since Frontier has disaggregated its Universal Service support, so that its Universal Service Funds are targeted toward its high-cost wire centers and away from its lower-cost wire centers.
- 10. Given the decision on an appropriate ETC service area for Easterbrooke, it is reasonable to direct Commission Staff to file the appropriate petition with the Federal Communications Commission pursuant to Section 214(e)(5) of the Communications Act of 1934, as amended, to obtain FCC concurrence in the redefinition of Easterbrooke's ETC service area as encompassing all wire centers located within WV RSA 5, and with the inclusion of the entirety of the Walkersville, Thomas and Davis wire centers, if Easterbrooke makes that choice, or with the complete elimination of the Walkesville, Thomas and Davis wire centers, if Easterbrooke chooses that option.

#### ORDER

IT IS, THEREFORE, ORDERED that the petition filed on June 19, 2003, by Easterbrooke Cellular Corporation, doing business as Cellular One, seeking designation as an eligible telecommunications carrier pursuant to 47 U.S.C. §214(e) in the wire centers served by Citizens Telecommunications Company of West Virginia, doing business as Frontier Communications of West Virginia, which are located wholly or partially within WV RSA 5, FCC Market No. 705, be, and hereby is, granted.

IT IS FURTHER ORDERED that Easterbrooke be, and it hereby is, required to notify the Public Service Commission and all parties to this proceeding, within thirty (30) days of the date that this decision becomes final, which of the following two (2) options it has selected:

- (1) It will commit to serving the entirety of Frontier's Walkersville, Thomas and Davis wire centers, even though those wire centers are located partially outside of Easterbrooke's FCC licensed service territory; or
- (2) It will withdraw the portions of the Walkersville, Thomas and Davis wire centers which are located within WV RSA 5 from its ETC petition.

IT IS FURTHER ORDERED that, within sixty (60) days of the date that this Order becomes final, Commission Staff file the appropriate petition with the Federal Communications Commission pursuant to Section 214(e) of the Communications Act of 1934, as amended, seeking FCC concurrence in the redefinition of Easterbrooke Cellular Corporation's service area for ETC purposes, as described herein, being the entirety of WV RSA 5, plus the portions of the Frontier's Walkersville, Thomas and Davis wire centers which extend beyond the boundaries of WV RSA 5, if Easterbrooke chooses that option, or with the elimination from Easterbrooke's ETC service territory of the portions of the Walkersville, Thomas and Davis wire centers which are located within WV RSA 5, if Easterbrooke chose that option.

IT IS FURTHER ORDERED that, within that same sixty (60) day period, Commission Staff shall provide to the Federal Communications Commission and the Universal Service Administrative Company a certified copy of this Order designating Easterbrooke as an ETC for the specified wire centers and service territory, along with a list of the areas designated to be served by Easterbrooke.

IT IS FURTHER ORDERED that Easterbrooke's ETC designation is conditioned upon its compliance with the Consumer Code for Wireless Service of the Cellular Telecommunications Industry Association.

IT IS FURTHER ORDERED that this matter be, and hereby is, removed from the Commission's docket of open cases.

The Executive Secretary is hereby ordered to serve a copy of this order upon the Commission by hand delivery, and upon all parties of record by United States Certified Mail, return receipt requested.

Leave is hereby granted to the parties to file written exceptions supported by a brief with the Executive Secretary of the Commission within fifteen (15) days of the date this order is mailed. If exceptions are filed, the parties filing exceptions shall certify to the Executive Secretary that all parties of record have been served said exceptions.

If no exceptions are so filed this order shall become the order of the Commission, without further action or order, five (5) days following the expiration of the aforesaid fifteen (15) day time period, unless it is ordered stayed or postponed by the Commission.

Any party may request waiver of the right to file exceptions to an Administrative Law Judge's order by filing an appropriate petition in writing with the Secretary. No such waiver will be effective until approved by order of the Commission, nor shall any such waiver operate to make any Administrative Law Judge's Order or Decision the Order of the Commission sooner than five (5) days after approval of such waiver by the Commission.

Melissa K. Marland Chief Administrative Law Judge

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Date Mailed September 30, 2003

## BEFORE THE

### PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Midwest Wireless Wisconsin, LLC for Designation as an Eligible Telecommunications Carrier in Wisconsin

8203-TI-100

### FINAL DECISION

This is the final decision in this proceeding to determine whether to designate Midwest Wireless Wisconsin, LLC (Midwest) as an Eligible Telecommunications Carrier (ETC), pursuant to 47 U.S.C. § 214(e)(2) and Wis. Admin. Code § PSC 160.13. Designation as an ETC makes a provider eligible to receive universal service fund (USF) monies.

### Introduction

Midwest filed an application for ETC designation on February 3, 2003. The Commission issued a Notice of Investigation on April 7, 2003. The Commission issued a Notice Requesting Comments on September 12, 2003. A number of entities filed comments on September 18, 2003. The Commission discussed this matter at its September 25, 2003 open meeting.

Midwest requested ETC designation for the exchanges shown in Appendix B. The territories for which ETC designation is requested are served by a mix of rural and non-rural telecommunications carriers.

<sup>&</sup>lt;sup>1</sup> Citizens Utility Board ("CUB"); CenturyTel, Inc. and TDS Telecom Corporation; the Wisconsin State Telecommunications Association Small Company Committee (WSTA Small Company Committee); Wisconsin State Telecommunications Association ILEC Division (WSTA ILEC Division); Wisconsin State

## Findings of Fact

- The wireless industry, its customary practices, its usual customer base, and Midwest's desire not to obtain state USF money create an unusual situation.
- 2. It is reasonable to adopt different ETC eligibility requirements and obligations for Midwest than specified by Wis. Admin. Code § PSC 160.13.
- It is reasonable to require Midwest to meet only the federal requirements for ETC status in order to be eligible for ETC designation.
- 4. It is reasonable to relieve Midwest from ETC obligations other than those imposed under federal law.
- 5. It is reasonable to require that Midwest not apply for state USF funds and that if it ever does, all state requirements for and obligations of ETC status shall again be applicable to it.
  - 6. Midwest meets the federal requirements for ETC designation.
- 7. It is in the public interest to designate Midwest as an ETC in certain areas served by rural telephone companies.
- 8. It is reasonable to grant Midwest ETC status in the non-rural wire centers indicated in its application, to the extent that the wire centers are located within the state.
- 9. It is reasonable to grant Midwest ETC status in the areas for which it has requested such designation where the request includes the entire territory of a rural telephone company, to the extent such areas are located within the state.
- 10. It is reasonable to grant Midwest ETC status in the areas for which it has requested such designation where the request does not include the entire territory of a rural

Telecommunications Association Wireless Division; Nsighttel Wireless (for seven applicants); Nextel and ALLTEL.

telephone company, to the extent the areas are located within the state, conditioned upon the Federal Communications Commission (FCC) approving the use of the smaller areas.

### Conclusions of Law

The Commission has jurisdiction and authority under Wis. Stats. §§ 196.02, 196.218 and 196.395; Wis. Admin. Code ch. PSC 160; 47 U.S.C. §§ 214 and 254; and other pertinent provisions of the Telecommunications Act of 1996, to make the above Findings of Fact and to issue this Order.

The law does not require the Commission conduct a hearing in this docket as requested by the CUB; CenturyTel, Inc., and TDS Telecom Corporation; and the WSTA Small Company Committee and WSTA ILEC Division.

If "notice and opportunity for hearing" as provided by Wis. Stat. § 196.50(2)(f) is applicable in this case, or if process is due to the current ETCs in the rural areas at issue on any other basis, the Notice Requesting Comments, dated September 12, 2003, satisfies this requirement.

## Opinion

On December 20, 2002, the Commission granted the U.S. Cellular ETC status as applied for in Docket No. 8225-TI-102. Application of United States Cellular Corporation for Designation as an Eligible Telecommunications Carrier in Wisconsin, Docket No. 8225-TI-102, 2002 WL 32081608, (Wisconsin Public Service Commission, December 20, 2002). The instant application is substantively similar to the application of U.S. Cellular. The Commission reaffirms its decision in Docket No. 8225-TI-102 and relies on the opinion issued in the Final Decision in that docket, to approve Midwest's application.

ETC status was created by the FCC, and codified in 47 U.S.C. § 214(e)(2). Under FCC rules, the state commissions are required to designate providers as ETCs. 47 U.S.C. § 214(e)(2), 47 C.F.R. § 54.201(b). Designation as an ETC is required if a provider is to receive federal universal service funding. ETC designation is also required to receive funding from some, but not all, state universal service programs.

The FCC established a set of minimum criteria that all ETCs must meet. These are codified in the federal rules. 47 U.S.C. § 214(e)(1), 47 C.F.R. § 54.101(a). The 1996

Telecommunications Act states that "States may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service." 47 U.S.C § 254(f). A court upheld the states' right to impose additional conditions on ETCs in *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 418 (5<sup>th</sup> Cir. 1999). While states must designate multiple ETCs if more than one provider meets the requirements and requests that status in a non-rural area, it must determine that it is in the public interest before designating more than one ETC in a rural area. 47 C.F.R. § 54.201. The Commission has already designated one ETC in each rural area.

In the year 2000, the Commission promulgated rules covering ETC designations and requirements in Wisconsin. Wis. Admin. Code § PSC 160.13. Those rules govern the process for ETC designation and set forth a minimum set of requirements for providers seeking ETC designation from the Commission. The application filed by Midwest asks that it be designated as an ETC for federal purposes only. It states that it is not seeking designation as an ETC for state purposes and, therefore, is not required to meet the additional state requirements.

States must examine the federal requirements, but are allowed to create additional requirements. Wisconsin has done so. The Commission's requirements for ETC designation

clarify and expand upon the more basic FCC rules. There is no provision in the rule for designation as an ETC for federal purposes only. If a provider seeks to be designated as an ETC, it must follow the procedures and requirements in Wis. Admin. Code § PSC 160.13 and, if such a designation is granted, that designation serves to qualify the provider for both state and federal universal service funding. However, Wis. Admin. Code § PSC 160.01(2)(b) provides that:

Nothing in this chapter shall preclude special and individual consideration being given to exceptional or unusual situations and upon due investigation of the facts and circumstances involved, the adoption of requirements as to individual providers or services that may be lesser, greater, other or different than those provided in this chapter.

Midwest's request for ETC status presents an unusual situation. The wireless industry, its customary practices, and its usual customer base are quite different than those of wireline companies. Additionally, Midwest has stated that it has no desire to obtain state USF money. The Commission finds that under the particular circumstances of this case, it is reasonable to adopt different ETC requirements for Midwest to meet, and to grant ETC status to Midwest with certain limitations.

Because Midwest only wishes to obtain federal USF support, the Commission shall adopt the federal requirements for ETC status as the requirements that Midwest must meet to obtain ETC status. The federal requirements are found in 47 U.S.C. § 214(e)(1) and 47 C.F.R. §§ 54.101(a), 54.405 and 54.411. Further, the Commission relieves Midwest from ETC obligations other than those imposed under federal law. However, since Midwest will not be subject to the state requirements and state obligations, the Commission requires that Midwest not apply for state USF money. If Midwest ever does apply for state USF money, then all of the state requirements for and obligations of ETC status shall again be applicable to Midwest.

The Commission finds that Midwest has met the requirements for ETC designation; it will offer supported service to all customers in its designation areas and will advertise these services. In the FCC Declaratory Ruling In the Matter of Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, FCC 00-248 (released 8/10/00), par. 24 (South Dakota Decision) the FCC has stated:

A new entrant can make a reasonable demonstration to the state commission of its capability and commitment to provide universal service without the actual provision of the proposed service. There are several possible methods for doing so, including, but not limited to: (1) a description of the proposed service technology, as supported by appropriate submissions; (2) a demonstration of the extent to which the carrier may otherwise be providing telecommunications services within the state; (3) a description of the extent to which the carrier has entered into interconnection and resale agreements; or, (4) a sworn affidavit signed by a representative of the carrier to ensure compliance with the obligation to offer and advertise the supported services.

If this is sufficient for a new entrant, it would seem to be even more so for someone who has already started to serve portions of the exchanges. Midwest submitted an affidavit ensuring compliance and, as mentioned earlier, is not only providing service in other areas of the state but also in parts of the areas for which it has requested ETC status.

The Commission finds that Midwest meets the requirement to offer service to all requesting customers. It has stated in its application and comments that it will do so. Many filing comments argue that the applicant will not provide service to all customers in the indicated exchanges and thus, because of the issue of "cellular shadows," the applicant will not meet the same standard that is applied to wireline providers. However, this is a case where "the devil is in the details." It is true that the purpose of universal service programs is to ensure that customers who might not otherwise be served at affordable rates by a competitive market still receive

service. However, like for wireline companies, access to high cost assistance is what helps ensure that service is provided. For Midwest, access to high cost assistance is exactly what will make expanding service to customers requesting service in the areas for which it is designated as an ETC "commercially reasonable" or "economically feasible." As the FCC has said:

A new entrant, once designated as an ETC, is required, as the incumbent is required, to extend its network to serve new customers upon reasonable request. South Dakota Decision, par. 17.

Midwest, like wireline ETCs, must fulfill this mandate, and access to high cost funding is what will help make doing so possible. The issue of "dead spots" is not significantly different from a wireline ETC that does not have its own lines in a portion of an exchange, perhaps a newly developed area. After obtaining a reasonable request for service, the wireline is required to find a way to offer service, either through extending its own facilities or other options. So too, Midwest must be given a reasonable opportunity to provide service to requesting customers, whether through expansion of its own facilities or some other method.

Midwest has also stated in its affidavit, application, and comments that it will advertise the designated services as required under 47 U.S.C. § 214(e)(1)(B), including the availability of low income programs.

Other objections to Midwest's designation focus on an alleged inability to meet certain additional state requirements in Wis. Admin. Code § PSC 160.13. These are moot, however, since the Commission has adopted different requirements for Midwest.

Some of the exchanges for which Midwest seeks ETC status are served by non-rural ILECs (SBC or Verizon). Under Wis. Admin. Code § PSC 160.13(3) and 47 U.S.C. § 251(e)(2), the Commission must designate multiple ETCs in areas served by such non-rural companies.

However, the Commission may only designate multiple ETCs in an area served by a rural company if designating more than one ETC is in the public interest. Some of the exchanges for which Midwest seeks ETC status are served by rural telephone companies.

The Commission finds that designating Midwest as an additional ETC in these areas is in the public interest. In its determination, the Commission is guided by the Wis. Stat. §196.03(6) factors to consider when making a public interest determination:

- (a) Promotion and preservation of competition consistent with ch. 133 and s. 196.219.
- (b) Promotion of consumer choice.
- (c) Impact on the quality of life for the public, including privacy considerations.
- (d) Promotion of universal service.
- (e) Promotion of economic development, including telecommunications infrastructure deployment.
- (f) Promotion of efficiency and productivity.
- (g) Promotion of telecommunications services in geographical areas with diverse income or racial populations.

The Commission finds that designating Midwest as an ETC in areas served by rural companies will increase competition in those areas and, so, will increase consumer choice.

While it is true that Midwest is currently serving in at least some of these areas, the availability of high cost support for infrastructure deployment will allow Midwest to expand its availability in these areas. Further, designation of another ETC may spur ILEC infrastructure deployment and encourage further efficiencies and productivity gains. Additional infrastructure deployment, additional consumer choices, the effects of competition, the provision of new technologies, a mobility option and increased local calling areas will benefit consumers and improve the quality of life for affected citizens of Wisconsin. As a result, the Commission finds that it is in the

public interest to designate Midwest as an ETC in the areas served by rural telephone companies for which it has requested such designation.<sup>2</sup>

The areas for which Midwest is granted ETC status vary. Wis. Admin. Code § PSC 160.13(2) states that the areas in which a provider shall be designated as an ETC depend on the nature of the ILEC serving that area. If the ILEC is a non-rural telephone company, the designation area is the ILEC's wire center. The FCC has urged states not to require that competitive ETCs be required to offer service in the entire territory of large ILECs. It has found that such a requirement could be a barrier to entry. Report and Order in the Matter of Federal-State Joint Board on Universal Service, FCC 97-157 (released 5/8/97) pars. 176-177 (First Report and Order). Wisconsin's rule provision resolves this federal concern. As a result, Midwest is granted ETC status in the SBC and Verizon wire centers for which it requested such status, to the extent that such wire centers are located within the state.

Wis. Admin. Code § PSC 160.13(2) provides that if the ILEC is a rural telephone company, the ETC designation area is different. For an area served by a rural telephone company, the designation area is generally the entire territory (study area) of that rural company. A smaller designation area is prohibited unless the Commission designates and the FCC approves a smaller area. 47 C.F.R. § 54.207(b). Midwest's application contained a list of rural telephone company areas for which it requested ETC status. Attachment B, prepared by the Commission, show the rural areas for which it believes Midwest is seeking ETC status. If this list is not accurate, Midwest is ordered to submit to the Commission a revised list, in the same format as the attachment to this order, by October 31, 2003.

<sup>&</sup>lt;sup>2</sup> Eighteen other state commissions and the FCC have approved wireless ETC applications as second ETCs in rural areas on similar grounds.

The Commission also grants ETC status to Midwest in the areas for which it is seeking designation for the entire territory of a rural telephone company, to the extent that such exchanges are located within the state. Finally, where Midwest is asking for ETC designation in some, but not all, parts of the territory of a rural telephone company, the Commission conditionally grants ETC status in the areas for which Midwest has requested such designation, to the extent that such exchanges are located within the state. However, Midwest must apply to the FCC for approval of the use of a smaller area in such a designation. 47 C.F.R. § 54.207(c)(1). If the FCC approves use of the smaller area, then Midwest's ETC status for the smaller area(s) becomes effective. If the FCC does not approve use of the smaller area(s), then Midwest's conditional ETC status for such an area is void. In such a case, if Midwest determines that it then wants to apply for ETC status in the entire territory of the rural company, it may submit a new application requesting such designation.

The Commission grants this conditional status after having considered the changing market and the reason why the limitations on ETC designation in rural areas was created.

Originally, there were concerns about "cherry picking" or "cream skimming." At that time, the USF support was averaged across all lines served by a provider within its study area. The per line support was the same throughout the study area. The concern was that competitive companies might ask for ETC designation in the parts of a rural company's territory that cost less to serve. It could thereby receive the averaged federal high-cost assistance while only serving the low-cost areas of the territory, while the ILEC received federal high-cost assistance but had to serve the entire territory, including the high-cost areas. First Report and Order, par. 189. As a result, the FCC found that unless otherwise approved by both the state and the FCC, a competitor

seeking ETC status in the territory of a rural company must commit to serving the entire territory. First Report and Order, par. 189.

However, since that time, the USF funding mechanisms have changed. Currently, a competitive ETC gets the same amount of federal high-cost assistance per line as the ILEC. An ILEC has the option to target the federal high-cost assistance it receives so that it receives more USF money per line in the parts of the territory where it costs more to provide service, and less federal USF money in the parts of the territory where it costs less to provide service. In the Matter of Multi-Association Group (MAG) Plan, FCC 01-157 (released 5/23/01), par. 147. (MAG Order) Since the competitive ETC receives the same per line amount as the ILEC, if it chooses to only serve the lower cost parts of the territory, then it receives only the lower amount of federal USF money. As a result, as recognized by the FCC, the concerns about "cherry picking" and "cream skimming" are largely moot. In the Matter of Reconsideration of Western Wireless Corporation's Designation as an Eligible Telecommunications Carrier in the State of Wyoming, FCC 01-311 (released 10/16/01), par. 12.

In the MAG Order, rural telephone companies were given the opportunity to choose a disaggregation and targeting method or to not disaggregate and target USF support. MAG Order, pars. 147-154. Companies were allowed to choose one of three targeting paths. Some of the companies in whose territory Midwest is seeking ETC designation chose Path One (no targeting) and some chose Path Three (targeting). If a competitive ETC is named in all, or part, of the service territory of a rural company, that company may ask the Commission to allow it to choose another Path. The FCC believed that state involvement in path changes gave competitors some certainty as to the amount of per line support available while preventing a rural company

from choosing or moving to a different path for anti-competitive reasons. MAG Order, par. 153.

Some of the companies in whose territory Midwest is seeking ETC designation have disaggregated and targeted USF support, and some have not. However, the Commission may allow a company to change paths when a competitive ETC is designated in a rural company's territory.

#### Requests for Hearing

In accordance with the Notice Requesting Comments, dated September 12, 2003, the Commission received eight filings, four of which requested, on various grounds, the Commission conduct a contested case hearing before deliberation of the application. CenturyTel, Inc. and TDS Telecom Corporation claimed a right to a hearing under Wis. Admin. Code § PSC 160.13(3) and Wis. Stat. § 227.42. WSTA Small Company Committee and WSTA ILEC Division also suggested that the Commission should hold a contested case hearing. Citizens Utility Board (CUB) also claimed a right to a hearing under Wis. Stat. § 227.42. The law, however, does not require the Commission conduct a hearing in this docket as requested. Furthermore, if "notice and opportunity for hearing" as provided by Wis. Stat. § 196.50(2)(f) is applicable in this case, or if process is due to the current ETCs in the rural areas at issue on any other basis, the Notice Requesting Comments, dated September 12, 2003, satisfies this requirement.

CenturyTel, Inc. and TDS Telecom Corporation claimed a right to a hearing under Wis. Admin. Code § PSC 160.13(3) and Wis. Stat. § 227.42.

Wis. Admin. Code § PSC 160.13 (3) states:

For an area served by an incumbent local exchange service provider that is a rural telephone company, the commission may only designate an additional

eligible telecommunications carrier after finding that the public interest requires multiple eligible telecommunications carriers, pursuant to federal law and s. 196.50 (2), Stats. For an area served by an incumbent local exchange service provider that is not a rural telephone company, the commission may designate an additional eligible telecommunications carrier without making such a finding.

Wis. Stat. § 196.50(2), designates the process to certify a telecommunications utility.

Wis. Stat. § 196.50(2), states in part, "... after notice and opportunity for hearing, that the applicant possesses sufficient technical, financial and managerial resources to provide telecommunications service to any person within the identified geographic area." According to the rule and statute it would appear that notice and opportunity for hearing is a required procedure in the instant case.

Wis. Stat. § 196.50(2), however, does not apply to an application for ETC status of a wireless company to be an additional ETC in a rural area. Wis. Stat. § 196.202, expressly restricts Commission jurisdiction over wireless providers. This statute prevents the Commission from applying almost every provision of Wis. ch. 196, to wireless providers, except for

<sup>3</sup> Wis, Stat. § 196.202, states:

Exemption of commercial mobile radio service providers. (2) Scope of regulation. A commercial mobile radio service provider is not subject to <a href="ch. 201">ch. 201</a> or this chapter, except as provided in <a href="sub.(5)">sub.(5)</a>, and except that a commercial mobile radio service provider is subject to <a href="sub.196.218">s. 196.218</a> (3) if the commission promulgates rules that designate commercial mobile radio service providers as eligible to receive universal service funding under both the federal and state universal service fund programs. If the commission promulgates such rules, a commercial mobile radio service provider shall respond, subject to the protection of the commercial mobile radio service provider's competitive information, to all reasonable requests for information about its operations in this state from the commission necessary to administer the universal service fund.

(5) Billing. A commercial mobile radio service provider may not charge a customer for an incomplete call.

Wis. Stat. § 196.218(3).<sup>4</sup> This section only applies if, "the commission promulgates rules that designate [cellular] providers as eligible to receive universal service funding under both the federal and state universal service fund programs." Wis. Stat. § 196.218(3), mandates telecommunications providers contribute to the Wisconsin Universal Service Fund (WUSF). (Wireless providers currently have been exempted.) This section, however, is wholly unrelated to the requirements for eligibility to receive money from the WUSF and, otherwise, unrelated to this case.

The Commission cannot apply Wis. Stat. § 196.50(2), to wireless providers. The Commission, therefore, cannot proceed under Wis. Stat. § 196.50(2)(f), when evaluating the ETC application of a wireless provider. As a matter of law, the reference to Wis. Stat. § 196.50(2)(b)(f), in Wis. Admin Code § PSC 160.13, cannot apply to ETC applications of wireless providers, including Midwest.

Wis. Stat § 227.42 provides a right to a hearing, treated as a contested case, to any person filing a written request for a hearing with an agency who meets the following four part test:

- (a) A substantial interest of the person is injured in fact or threatened with injury by agency action or inaction;
- (b) There is no evidence of legislative intent that the interest is not to be protected;
- (c) The injury to the person requesting a hearing is different in kind or degree from injury to the public caused by the agency action or inaction; and
- (d) There is a dispute of material fact.

<sup>&</sup>lt;sup>4</sup> Wis. Stat. § 196.218 (3), states, in part:

Contributions to the fund. (a) 1. Except as provided in <u>par. (b)</u>, the commission shall require all telecommunications providers to contribute to the universal service fund beginning on January 1, 1996. determined by the commission under <u>par. (a) 4.</u>

Century Tel, Inc. and TDS Telecom Corporation own local exchange telephone companies that provide essential telecommunications service as ETCs in the rural areas at issue. These companies are competitors of Midwest. On this basis, these companies claim they have a substantial interest protected by law, and will suffer special injury based on the ETC designation of Midwest. Federal law and state law, however, do not create a substantial, or property, interest in exclusive ETC status for incumbent rural ETCs. Alenco Communications v. FCC, 201 F.3d 608 (2000) ("The purpose of universal service is to benefit the customer, not the carrier."); WITA v. WUTA, 65 P.3d 319 (2003); "In re Application of GCC License Corp., 647 N.W.2d 45, 52, 264 Neb. 167, 177 (2002)." ("[r]ather, customers' interest, not competitors', should control agencies' decisions affecting universal service" and that "[t]he Telecommunications Act does not mention protecting the private interests of incumbent rural carriers, who are often exclusive ETCs simply by default as the sole service provider operating in a particular area.") See also, State ex rel. 1st Nat. Bank v. M&I Peoples Bank, 95 Wis. 2d 303, 311 (1980). (Economic injury as the result of lawful competition does not confer standing.); MCI Telecommunications v. Pub. Serv. Comm., 164 Wis. 2d 489, 496, 476 N.W.2d 575 (Ct. App. 1991); and Wisconsin Power & Light v. PSC, 45 Wis. 2d 253 (1969) ("... the predominant purpose underlying the public utilities law is the protection of the consuming public rather than the competing utilities.")

In addition, these companies also claim that granting Midwest ETC status will reduce the amount of USF funds available to the public. As explained above, such result does not injure companies' protected interest. As explained below, increasing the

number of carriers eligible for federal USF money will increase the amount of federal USF dollars brought into Wisconsin. Moreover, companies' claim is entirely speculative.

WSTA Small Company Committee and WSTA ILEC Division also suggested that the Commission should hold a contested case hearing. These organizations represent local exchange telephone companies that provide essential telecommunications service as ETCs in the rural areas at issue who are competitors of Midwest. These comments suggest the Commission hold a contested case hearing. These organizations, however, did not invoke Wis. Stat. § 227.42 or attempt to apply the standards therein. Had these organizations claimed such a right to a hearing under Wis. Stat. § 227.42, the same analysis would apply to them as described for the CenturyTel, Inc. and TDS Telecom Corporation claim.

CUB also claims a right to a hearing under Wis. Stat. § 227.42. CUB further requests that the Commission consolidate ten pending ETC applications of wireless providers into one contested case for investigation of common issues.

CUB asserts it has a substantial interest protected by law, and will suffer special injury based on the ETC designation of Midwest because it claims to represent customers in the geographic area in which the applicant seeks ETC designation. As customers of the current ETC in that area, and as payees into the universal service fund, its members have a substantial interest that fund money is not wasted through certification of an inappropriate carrier. The federal USF, however, provides a benefit to customers through the assistance of carriers who commit to providing service in high-cost areas. The designation of more than one ETC in a particular high-cost area

allows more carriers providing service in rural Wisconsin, such as Midwest, to tap into money collected on a nation-wide basis so that more services and more provider choices can be afforded to these customers. As such, far from threatening their substantial interests, ETC designation, like the instant one, necessarily provides a benefit to customers. On this basis, a hearing was not required by CUB's request.

CUB asserted that it meets the standards of Wis. Stat. § 227.42(1)(d), because it disputes the factual assertions made by the applicant that allowing it to receive ETC status will further the public interest by bringing the benefits of competition to underserved marketplaces and that the application provides the Commission with enough information regarding what services will be offered and at what cost to support it claims ETC designation is in the public interest. These assertions amount to a generalized challenge regarding the sufficiency of Midwest's application. A hearing, however, is not required on such basis. Wis. Stat. § 227.42(1), contemplates that a requester provide some showing that it meets the four part test. CUB fails to present any facts that either contradict the assertions of the applicant or demonstrate that any of CUB's alleged deficiencies in the application are fact-based and material.

All filers requesting a hearing state or allude to the cumulative effect of granting the ten pending wireless ETC applications as an appropriate issue in this docket. The Commission, however, has not consolidated these applications into one case. The ETC designation process is based on the application of an individual carrier to the standards Wis. Admin. Code § PSC 160.13. Issues regarding the cumulative impact of this decision, and decisions like it, are not before the Commission.

The law does not require the Commission conduct a hearing in this docket. If "notice and opportunity for hearing" as provided by Wis. Stat. § 196.50(2)(f) is applicable in this case, or if process is due to the current ETCs in the rural areas at issue on any other basis, the Notice Requesting Comments, dated September 12, 2003, satisfies this requirement. Waste Management of Wisconsin v. DNR, 128 Wis. 2d 59, 78, 381 N.W.2d 318 (1985). (An appropriate "opportunity for hearing" may be exclusively through written comments.)

#### Order

- Midwest is granted ETC status in the non-rural wire centers indicated in its application, to the extent the wire centers are located within the state.
- Midwest is granted ETC status in the areas for which it has requested such designation where the request includes the entire territory of a rural telephone company, to the extent the areas are located within the state.
- 3. Midwest is granted ETC status in the areas for which it has requested such designation where the request does not include the entire territory of a rural telephone company, to the extent the areas are located within the state, conditioned upon the FCC approving the use of the smaller areas.
- 4. Midwest shall file a revised list of rural areas for which it is seeking ETC status by October 31, 2003, if the list attached to this order is inaccurate. The revised list shall use the same format as the attachment.
- 5. Midwest must request that the FCC approve the use of an area smaller than the entire territory of certain rural telephone companies (listed in an attachment to this order) when granting ETC status in those areas.

6. If the FCC does not approve the use of areas smaller than the entire territory of a rural telephone company when granting ETC status in those areas, then the conditional grant of ETC

status in this order is void.

7. Midwest shall not apply for state USF support. If it ever does file for such support, the

state eligibility requirements for, and obligations of ETC status, shall immediately apply to it.

8. Based on the affidavit of Dennis Findley, Vice President and Chief Financial Officer,

Midwest is an ETC within the meaning of 47 U.S.C. § 214 (c) and is eligible to receive funding

pursuant to 47 U.S.C. § 254 (2). This order constitutes the certification to this effect by the

Commission.

9. The requests for a contested case hearing by CenturyTel, Inc., TDS Telecom Corp., CUB,

WTSA Small Company Committee, and WSTA ILEC Division are rejected.

10. Jurisdiction is maintained.

Dated at Madison, Wisconsin,	 	
By the Commission:		

Lynda L. Dorr Secretary to the Commission

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See attached Notice of Appeal Rights

## Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in Wis. Stat. § 227.01(3), a person aggrieved by the order has the further right to file one petition for rehearing as provided in Wis. Stat. § 227.49. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after reflearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98

#### APPENDIX A

This proceeding is not a contested case under Wis. Stat. Ch. 227, therefore there are no parties to be listed or certified under Wis. Stat. § 227.47. However, an investigation was conducted and the persons listed below participated.

PUBLIC SERVICE COMMISSION OF WISCONSIN (Not a party, but must be served) 610 North Whitney Way P.O. Box 7854 Madison, WI 53707-7854

MS STEPHANIE L MOTT ATTY REINHART BOERNER VAN DEUREN PO BOX 2018 MADISON WI 53701-2018

MR PETER L GARDON REINHART BOERNER VAN DEUREN PO BOX 2018 MADISON WI 53701-2018

MR NICK LESTER WSTA 6602 NORMANDY LN MADISON WI 53719

MR BRUCE C REUBER INTERSTATE TELCOM CONSULTING INC PO BOX 668 HECTOR MN 55342-0668 MR LARRY L LUECK NSIGHT TELSERVICES/NORTHEAST TEL CO PO BOX 19079 GREEN BAY WI 54307-9079

MR JUDD A GENDA ATTY AXLEY BRYNELSON LLP 2 E MIFFLIN ST STE 200 MADISON WI 53703

MS KIRA E LOEHR CULLEN WESTON PINES AND BACH LLP 122 W WASHINGTON AVE SUITE 900 MADISON, WI 53703

MR JORDAN J. HEMAIDEN MICHAEL BEST AND FREIDRICH LLP P O BOX 1806 MADISON, WI 53701-1806

MR JOSEPH P WRIGHT STAFFORD ROSENBAUM LLP P O BOX 1784 MADISON, WI 53701-1784

BRENT G EILEFSON ESQ LEONARD, STREET AND DEINARD PA 150 SOUTH FIFTH STREET SUITE 2300 MINNEAPOLIS MN 55402

## APPENDIX B

# Non-Rural Wire Centers

Operating Company	Exchange
SBC Wisconsin	Ellsworth
SBC Wisconsin	Menomonie
SBC Wisconsin	River Falls (partial)
SBC Wisconsin	Eau Claire (Partial)

# Rural Wire Centers (Requesting entire service territory)

Operating Company	Exchange Page 1
Cochrane Cooperative Telephone Co.	Cochrane
Cochrane Cooperative Telephone Co.	Waumandee
Hager Telecom, Inc.	<ul> <li>Bay City</li> </ul>
Hager Telecom, Inc.	Hager City
Nelson Telephone Cooperative	Durand
Nelson Telephone Cooperative	Arkansaw
Nelson Telephone Cooperative	Nelson
Nelson Telephone Cooperative	Gilmanton
Tenney Telephone Co.	Alma -

# Rural Wire Centers (not requesting entire service territory)

Operating Company	<u>Exchange</u>	
Telephone USA of Wisconsin, LLC d/b/a CenturyTel, Inc.		
(Wire Centers)	Prescott	
(Wire Centers)	Elmwood	
(Wire Centers)	Plum City	
(Wire Centers)	Maiden Rock	
(Wire Centers)	Pepin	
(Wire Centers)	Knapp	
(Wire Centers)	Boyceville	
(Wire Centers)	Glenwood City (Partial)	
(Wire Centers)	Wheeler	
(Wire Centers)	Colfax (Partial)	
(Wire Centers)	Elk Mound (Partial)	
CenturyTel of Central Wisconsin, LLC d/b/a CenturyTel, Inc.		
(Wire Centers)	Fountain City	
(Wire Centers)	Arcadia (Partial)	
Chibardun Telephone Coop.	Ridgeland (Partial)	
Chibardun Telephone Coop.	Sand Creek (Partial)	

Chibardun Telephone Coop.
Chibardun Telephone Coop.
Frontier- Mondovi
West Wisconsin Telecom Cooperative, Inc.
Spring Valley Telephone

Prairie Fann (Partial)
Dallas (Partial)
Mondovi (Partial)
Spring Lake (Partial)
Eau Galle
Downsville
Rock Falls (Partial)
Elk Lake (Partial)
Spring Valley